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141-437

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

~~No. 335.~~ 38

SYLVESTER H. KNEELAND, APPELLANT,

vs.

CHARLES L. LUCE AND JOHN T. NEWTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED FEBRUARY 28, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 8, 1891.

1 Pleas of the circuit court of the United States within and for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial circuit, and the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

THE CENTRAL TRUST COMPANY OF NEW York, James M. Quigley, Charles T. Harbeck, and John McNab
vs.
THE TOLEDO, DELPHOS & BURLINGTON Railroad Company, The Toledo, Cincinnati and St. Louis Railroad Company, and Grenville D. Braman.
} Chancery. No. 7706.

In the matter of the intervening petition of John T. Newton and Charles L. Luce, Martha Stebbins, and George Stebbins.

Be it remembered that heretofore, to wit, at the May term of said court, on the 20th day of October, 1883, before the Honorable William A. Woods, one of the judges of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by Messrs. Butler, Stillman & Hubbard, Messrs. Hoadly, Johnson & Colston, and Messrs. Baker, Hord & Hendricks, its solicitors, and files its bill of complaint herein in the words following, to wit:

2 To the judges of the circuit court of the United States for the district of Indiana:

The Central Trust Company of New York, a corporation organized and existing under the laws of the State of New York and a citizen of that State, brings this its bill of complaint against the Toledo, Delphos & Burlington Railroad Company, a corporation organized under the laws of the States of Ohio and Indiana; the Toledo, Cincinnati & St. Louis Railroad Company, a corporation created by and existing under the laws of the States of Ohio, Indiana, and Illinois and a citizen of the State of Indiana, and Grenville D. Braman, a citizen of Massachusetts; and thereupon your orator complains and says:

1. That on the 17th day of January, 1880, the Toledo, Delphos & Burlington Railroad Company, a corporation created by and existing under the laws of the States of Ohio and Indiana, formed by the consolidation of certain corporations known as the Toledo and Maumee Narrow-Gauge Railroad Company, the Toledo, Delphos and Indianapolis Railway Company, the Delphos and Kokomo Railway Company, and the Delphos, Bluffton and Frankfort Rail-

road Company, was engaged in the construction and equip-
3 ment of the line of railroad from Toledo, Ohio, to Kokomo, Indiana, hereinafter more particularly described; and on said last-mentioned day, by its president and secretary, under its corporate seal and in pursuance of a resolution to that end duly adopted by the board of directors of said corporation on the 12th day of December, 1879, which resolution was thereafter and before the execution of the bonds and deed of trust or mortgage hereinafter mentioned duly ratified by the vote of a majority of the stockholders of said corporation at a meeting duly convened and held on the 17th day of January, 1880, said Toledo, Delphos and Burlington Railroad Company did execute its one thousand two hundred and fifty bonds for the sum of $1,000 each, dated the 1st day of January, 1880, payable on the 1st day of January, 1910, bearing six per cent. interest per annum, payable semi-annually on the first days of January and July in each and every year at the city of New York, each having interest warrants or coupons for thirty dollars each thereto attached for payment of the interest as aforesaid; and the said Toledo, Delphos & Burlington Railroad Company issued and sold one thousand two hundred and
4 fifty of said bonds, with said interest warrants or coupons attached, all of which said bonds were, before the same were issued, duly certified by your orator, and said bonds are now in the hands of divers and sundry persons as holders thereof, and with the proceeds of sale of said bonds the said corporation proceeded to construct, equip, maintain, and operate said railway.

2. Your orator further shows that, in order to secure the payment of the principal and interest of said issue of bonds, the said Toledo, Delphos & Burlington Railroad Company did, on said 17th day of January, 1880, in pursuance of the further provision of said resolution, execute and deliver unto your orator, a corporation created by and existing under the laws of the State of New York and a citizen of said last-mentioned State, a certain deed or indenture of trust and mortgage, which was duly recorded in the counties of Lucas and Henry, Ohio, on January 21, 1880; in the counties of Wood and Putnam, Ohio, on January 22, 1880; in the counties of Allen and Van Wert, Ohio, on January 23, 1880; in the counties of Adams and Wells, Indiana, on January 24, 1880; in the counties of Huntington and Wabash, Indiana, on January 26, 1880; in the counties of Grant and Howard, Indiana, on January 27, 1880, and in the county of Miami, Indiana, on January 28, 1880;
5 and thereby it did bargain, sell, grant, convey, and confirm unto your orator and its successor or successors in trust all and singular the line of railroad of the said Toledo, Delphos & Burlington Railroad Company, as the same then was or should thereafter be constructed, between Toledo, Lucas county, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen, and Van Wert, in the State of Ohio, and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant, and Howard, in the State of Indiana (and not including the branch line from Delphos, Allen county, Ohio, thence via Spencerville, Mendon, and Mercer and through the coun-

road Company, was engaged in the construction and equip-
3 ment of the line of railroad from Toledo, Ohio, to Kokomo, Indiana, hereinafter more particularly described; and on said last-mentioned day, by its president and secretary, under its corporate seal and in pursuance of a resolution to that end duly adopted by the board of directors of said corporation on the 12th day of December, 1879, which resolution was thereafter and before the execution of the bonds and deed of trust or mortgage hereinafter mentioned duly ratified by the vote of a majority of the stockholders of said corporation at a meeting duly convened and held on the 17th day of January, 1880, said Toledo, Delphos and Burlington Railroad Company did execute its one thousand two hundred and fifty bonds for the sum of $1,000 each, dated the 1st day of January, 1880, payable on the 1st day of January, 1910, bearing six per cent. interest per annum, payable semi-annually on the first days of January and July in each and every year at the city of New York, each having interest warrants or coupons for thirty dollars each thereto attached for payment of the interest as aforesaid; and the said Toledo, Delphos & Burlington Railroad Company issued and sold one thousand two hundred and
4 fifty of said bonds, with said interest warrants or coupons attached, all of which said bonds were, before the same were issued, duly certified by your orator, and said bonds are now in the hands of divers and sundry persons as holders thereof, and with the proceeds of sale of said bonds the said corporation proceeded to construct, equip, maintain, and operate said railway.

2. Your orator further shows that, in order to secure the payment of the principal and interest of said issue of bonds, the said Toledo, Delphos & Burlington Railroad Company did, on said 17th day of January, 1880, in pursuance of the further provision of said resolution, execute and deliver unto your orator, a corporation created by and existing under the laws of the State of New York and a citizen of said last-mentioned State, a certain deed or indenture of trust and mortgage, which was duly recorded in the counties of Lucas and Henry, Ohio, on January 21, 1880; in the counties of Wood and Putnam, Ohio, on January 22, 1880; in the counties of Allen and Van Wert, Ohio, on January 23, 1880; in the counties of Adams and Wells, Indiana, on January 24, 1880; in the counties of Huntington and Wabash, Indiana, on January 26, 1880; in the counties of Grant and Howard, Indiana, on January 27, 1880, and in the county of Miami, Indiana, on January 28, 1880;
5 and thereby it did bargain, sell, grant, convey, and confirm unto your orator and its successor or successors in trust all and singular the line of railroad of the said Toledo, Delphos & Burlington Railroad Company, as the same then was or should thereafter be constructed, between Toledo, Lucas county, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen, and Van Wert, in the State of Ohio, and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant, and Howard, in the State of Indiana (and not including the branch line from Delphos, Allen county, Ohio, thence via Spencerville, Mendon, and Mercer and through the coun-

ties of Allen, Van Wert, and Mercer to Shanesville, Mercer county, Ohio), being about one hundred and eighty miles in length, together with all and singular the rights of way, road-bed, made or to be made, its track, laid or to be laid, between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way then appertaining or which should thereafter appertain unto said described line of railroads, together with all the engines, cars, machinery, supplies, tools, and fixtures which
6 were then or should be at any time thereafter held, owned, or acquired by the said railroad company for use in connection with the line of railroad aforesaid, and all its depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other terminal facilities, together with all and singular the powers and franchises thereto belonging, and the tolls, income, and revenue to be levied and derived therefrom; to have and to hold the said granted premises unto your orator and its successors forever, in trust, nevertheless, and for the uses and purposes expressed in said deed of trust or mortgage, which will more fully and at large appear by reference to the original thereof, and your orator craves leave to produce and refer to said original on the hearing of this cause.

3. Your orator further shows that in and by said mortgage or deed of trust to your orator it was, among other things, provided, and the said Toledo, Delphos and Burlington Railroad Company did therein covenant and agree, that if the interest due on any of said bonds should not be paid by the said last-mentioned railroad company when the same should become due and should remain in arrears for six
7 months after it had been actually demanded at the place where the same was payable, as specified in said coupons, or in case the principal of said bonds or any of them should not be paid at their maturity, then it should be lawful for your orator or its successor to forthwith demand, enter, take, and maintain possession of all and singular the railroad premises and franchises thereby conveyed, and as the attorney-in-fact or agent of said last-mentioned railroad company, by itself and agents or substitutes duly constituted, have, use, manage, operate, and enjoy the same and each and every part thereof to as full an extent as the said railroad company might lawfully do, and should make from time to time all needful repairs, alterations, and additions thereto and receive all the tolls, income, and revenue thereof; and after deducting the expense of such use, operation, reasonable repairs, alterations, and additions, and the cost and charges of taking such possession and a fair compensation for the services of such trustee for such taking possession and management while in possession, your orator or its successor for the time being should apply the remaining income and revenue arising from the use of said mortgaged property and coming to its hand to the payment of
8 interest in default and maturing from time to time, satisfying the said coupons in the order of their several maturities, and thereafter apply the residue upon the principal of said then outstanding bonds.

And your orator further shows that it was also provided in

said mortgage or deed of trust that if a six months' default should occur either in payment of principal or interest on any of the bonds thereby secured after such actual demand as aforesaid, then it should be lawful for your orator or said trustee for the time being, with or without entry as aforesaid, to cause all and singular the said premises, railway, and appurtenances, equipment, and franchises thereby conveyed to be sold as an entirety at public auction to the highest and best bidder at the city of Kokomo, Indiana, after giving at least sixty days' notice of the time, place, and terms of sale by advertisement in a newspaper of general circulation in the city of Kokomo and like advertisement in a newspaper of general circulation in the city of New York, and on such sale your orator or the trustee for the time being should make, execute, acknowledge, and deliver unto the purchaser or purchasers thereof a good and sufficient deed in fee simple, conveying the said railroad property and franchises so sold, which conveyance should be a perpetual bar, in law and equity, against said last-mentioned railroad company, its successors and assigns, and all persons claiming or to claim under them, of all right, title, interest, or claim of, in, or to the said premises and franchises or any part thereof, and that your orator, after deducting from the proceeds of sale the costs and expenses thereof and a reasonable compensation to said trustee and its attorneys and agents for services in connection therewith, should apply so much of the proceeds as might be necessary to the ratable payment of principal and the then accrued interest of all the said bonds, whether the said principal should then be due or not; and if any proceeds of such sale should remain in its hands after the full payment of the principal and accrued interest of all said bonds, then it should render and pay over the same to the said last-mentioned railroad company or its successors and assigns.

And your orator further shows that it was provided in said mortgage or deed of trust and the said last-mentioned railroad company did therein and thereby expressly covenant and agree that it would, in case of default in the payment by it either of the principal or interest of any of its bonds thereby secured, forthwith, upon demand of your orator or of the trustee for the time being, surrender the full and peaceable possession of all and singular the premises thereby conveyed or intended to be, including all the real and personal property by it acquired subsequent to the date of said mortgage, for use in connection with the said line of railroad between said points, and would also surrender all books of account, records, and papers used by it in and about the operation thereof.

6. Your orator further shows that the said last-mentioned railroad company, The Toledo, Delphos & Burlington Railroad Company, has failed to pay the interest on said bonds and has made default therein to all the holders thereof, and said company has failed to pay the interest warrants or coupons due thereon January 1, 1883, and July 1, 1883, and the same have ever since remained unpaid, although payment of the same was duly demanded, and that said

default has continued and said interest has remained in arrears for more than six months, and many of the holders of said bonds to whom such default has been made have required your
11 orator to institute the necessary legal proceedings to foreclose said mortgage and sell the said mortgaged railway and property of the Toledo, Delphos & Burlington Railroad Company, known as the main line of the Toledo, Delphos & Burlington Railroad Company, and for the appointment of a receiver of said property, and to take such other and further steps necessary and proper for the protection of the rights of the holders of said bonds as your orator may be authorized to take by said deed of trust or mortgage; and your orator deems it for the interest of the parties concerned, particularly of the holders of the said first-mortgage bonds and coupons, to institute judicial proceedings for the foreclosure of said mortgage or deed of trust, and for the sale of all the premises and property thereby conveyed, and for the appointment of a receiver to take possession of, operate, and control the said railroad and its branches, and to take an inventory of all the personal or moveable property included in said mortgage, and to keep an account of the earnings and expenses incurred in operating the said railroad and branches.

And your orator further shows that the said Toledo, Del-
12 phos & Burlington Railroad Company, proper corporate action for that purpose having first been had, did, on the 17th day of January, 1880, deliver to your orator as trustee a certain other deed of trust or mortgage, bearing date on that day, whereby it granted, bargained, sold, and conveyed to your orator as trustee all the railroad, property, rights, franchises, goods, and chattels described or mentioned in the mortgage first set forth in this bill, then owned or thereafter to be acquired, to secure the payment at maturity of the principal of one thousand two hundred and fifty bonds of the said Toledo, Delphos & Burlington Railroad Company, known as income bonds, for one thousand dollars each, numbered from 1 to 1250, inclusive, payable on the 1st day of January, 1910, and of such interest thereupon as might become due thereon according to the tenor of said last-mentioned — indenture expressly agreed that interest upon said bonds was not to be due or payable except out of net earnings of said railroad company applicable to such purpose and when the amount should have been ascertained and declared by the board of directors of said last-mentioned company, whose duty it was, by the terms of said indenture, in each year during the currency of said bonds, beginning with the year 1881, in the
13 month of January, to declare what amount, if any, of net earnings had been made during the preceding fiscal year which was justly applicable to the payment of interest on said income bonds, and such ascertainment of net earnings was to be made by deducting from gross income all operating expenditures, including rebates, taxes, insurance, liabilities for interest on the existing first-mortgage bonds of the said railroad company, and other payments, as by reference to said income mortgage will more fully and at large appear.

That the said last-mentioned mortgage was duly recorded in each of the counties in which the said first mortgage was recorded so as to constitute a second lien or mortgage upon the railroad and property thereby conveyed.

Your orator further shows, on information and belief, that twelve hundred and fifty of said bonds so secured as aforesaid by said second or income mortgage have been issued and disposed of by said Toledo, Delphos & Burlington Railroad Company and are now in the hands of divers persons as owners thereof, who are unknown to your orator.

14 Your orator further shows that no interest has become or is now due and payable on said last-mentioned bonds under the terms thereof and of said second mortgage owing to insufficiency of earnings, but that the principal of said bonds issued as aforesaid is a lien upon said property, rights, franchises, etc., of said Toledo, Delphos & Burlington Railroad Company described in said mortgage next after the first mortgage hereinbefore described.

6. Your orator further shows that in or about the month of February, 1882, a certain corporation known as the Toledo, Cincinnati & St. Louis Railroad Company (of Indiana and Illinois), claiming to be a corporation of the said States of Indiana and Illinois by virtue of certain consolidations, and a certain other corporation, known as the Frankfort, St. Louis & Toledo Railroad Company, claiming to be a corporation of the State of Indiana, and the defendant The Toledo, Delphos and Burlington Railroad Company entered into an agreement with each other whereby said several corporations undertook, under the name of the Toledo, Cincinnati & St. Louis Railroad Company, to consolidate and unite all the lines of railroad of the Toledo, Delphos and Burling-

15 ton Railroad Company (including said main-line division) with the lines of railroad of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois and of the Frankfort, St. Louis & Toledo Railroad Company at their respective points of connection, and to consolidate the capital stock of the said respective companies under the laws of Ohio, Indiana, and Illinois, and to transfer and vest in said consolidated company, under the name of the Toledo, Cincinnati & St. Louis Railroad Company, all the powers, privileges, immunities, and property, real, personal, and mixed, belonging to the respective companies, parties to said agreement of consolidation.

And your orator further shows that the said company formed by said last-mentioned consolidation and known as the Toledo, Cincinnati & St. Louis Railway Company had or claimed to have the power to and did construct or maintain and operate a railroad from the city of Toledo, in the State of Ohio, to the town of Delphos, in said State, and thence through the States of Indiana and Illinois into the city of East St. Louis, in Illinois, including the line of railroad described in the mortgages hereinbefore set forth, and from

16 said town of Delphos to Dayton, Ohio, and also a railroad from Dayton to Wellston, Jackson county, Ohio, and thence to Gallipolis, Gallia county, Ohio, and a branch to a point at or near

Ironton, Ohio, and also the railroad formerly of the Iron Railroad Company, in Lawrence county, Ohio, with a branch extending from near Shakertown, Ohio, to a point at or near Lebanon, Ohio, to wit, at Dodd's, Warren county, Ohio, and a branch from Mercer to Shanesville, Ohio, and that on or about the 5th day of May, 1883, the said Toledo, Cincinnati & St. Louis Railroad Company entered into a further agreement of consolidation with two corporations organized under the laws of the State of Ohio, known respectively as the Cincinnati Northern Railway Company and the Spring Grove, Avondale and Cincinnati Railway Company, the first-named company owning or being engaged in constructing a railroad from Cincinnati, Ohio, to Waynesville, Warren county, Ohio, and the second-named company being the owner of a line of railroad from a point in Cincinnati to Spring Grove cemetery, Hamilton county, Ohio, which had theretofore been leased to said Cincinnati Northern Railway Company, whereby said three corporations undertook to consolidate and unite all their said lines of railroad and to
17 consolidated the capital stock of the said respective companies under the laws of Ohio, and to transfer to and vest in the said new consolidated company, under the name of the Toledo, Cincinnati and St. Louis Railroad Company (the defendant in this bill of complaint), all the powers, privileges, immunities, and property, real, personal, and mixed, belonging to the respective companies, parties to said agreement of consolidation, said consolidated company expressly recognizing and affirming the said several mortgages hereinbefore mentioned and the said bonds and coupons secured thereby and assuming payment of the same, the capital stock of said new consolidated company to be thirty millions of dollars, of which eleven millions was to be preferred stock and the balance thereof to be common stock.

Your orator further shows that it is informed and believes that said several agreements of consolidation were acted upon by said companies from said respective dates, although your — says that it was not a party to said consolidations or either of them, and has not assented thereto or acquiesced therein.

7. Your orator further shows that it is claimed by said defendant, The Toledo, Cincinnati & St. Louis Railroad Company,
18 that it owns, by virtue of said last-mentioned consolidation, all the aforesaid property, rights, franchises, and assets of the said Toledo, Delphos & Burlington Railroad Company mentioned and described in the two several mortgages aforesaid, and that the same have become subject to the debts and liabilities of said consolidated company; but your orator says that whatever rights, if any, in or to the same the said Toledo, Cincinnati & St. Louis Railroad Company acquired by virtue of said consolidation, the same are subject and subordinate to the several mortgages hereinbefore stated, and that the railroad property, franchises, rights, and assets embraced in and covered by said mortgages are not, nor were they at the time of the said last-mentioned consolidation, sufficient to pay the amount of all the bonds and interest secured thereon by the several mortgages hereinbefore mentioned.

Your orator further shows that several of the constituent companies *furnishing* the said consolidated corporation known as the Toledo, Cincinnati & St. Louis Railroad Company heretofore executed various mortgages on the lines of railway and property owned by them respectively to your orator as trustee; which said mort-
19 gages in the aggregate cover, as your orator is informed and believes, substantially all of the property of said defendant, The Toledo, Cincinnati & St. Louis Railroad Company, and that default has been made in the payment of interest on all of the bonds secured thereby except income bonds, and that said mortgages are as follows:

1. First mortgage (terminal trust), Toledo, Delphos & Burlington Railroad Company to Central Trust Company, trustee, dated June 21, 1880, to secure $250,000 of bonds and covering property in Toledo.

2. First mortgage, Toledo, Delphos and Burlington Railroad Company to Central Trust Company, trustee, dated July 1, 1880, to secure $1,000,000 of bonds, covering Dayton Division, from Delphos to Dayton.

3. First mortgage, Toledo, Delphos & Burlington Railroad Company to Central Trust Company, trustee, dated May 16, 1881, to secure $250,000 of bonds and covering Cincinnati Division, from Shakertown to Lebanon, Ohio.

4. First mortgage, Toledo, Cincinnati & St. Louis Railroad Company to Central Trust Company and Thomas A. Hendricks,
20 trustees, dated July 23, 1881, to secure $3,000,000 of bonds, covering line from Kokomo to East St. Louis.

5. First mortgage, Toledo, Delphos & Burlington Railroad Company to Central Trust Company, trustee, dated May 16, 1881, to secure $2,250,000 of bonds and covering Southeastern Division, from Dayton to point at or near Ironton.

6. First mortgage, Iron Railroad Company to Central Trust Company, trustee, dated August 1, 1881, to secure $500,000 of bonds and covering lines in Lawrence county, Ohio.

7. First mortgage, Cincinnati Northern Railway Company to Central Trust Company, trustee, dated October 1, 1880, to secure $1,000,000 of bonds and covering line from Waynesville to Cincinnati.

8. First mortgage, Spring Grove, Avondale & Cincinnati Railway Company to Central Trust Company, trustee, dated May 25, 1881, to secure $1,000,000 of bonds and covering line from Cincinnati to Spring Grove cemetery.

9. The mortgage particularly described in the second paragraph of this bill.

Your orator further shows that there are also other mortgages held by your orator as trustee and made by said several constit-
21 uent railroad companies other than said Spring Grove, Avondale & Cincinnati Railway Company to secure income bonds which are junior to the several first mortgages hereinbefore recited and which are liens upon said divisions respectively, except that embraced in and covered by said terminal trust mortgage.

That your — has commenced or is about to commence, in courts of competent jurisdiction, proper legal proceedings or suits in equity to foreclose the said several mortgage liens and to procure the appointment of a receiver of each of said separate lines covered by said respective mortgages, and that your orator is advised and believes that it will be for the interest of all the parties concerned, and especially of the several holders of the bonds and coupons secured by said several and respective mortgages, that the accounts and affairs of each of the said several lines or divisions should be kept separate from each of the other divisions of said consolidated company, and that some one competent person should be appointed as receiver in each of the several suits or proceedings so as aforesaid commenced or to be commenced by your orator.

22 Your orator further says that, as it is informed and believes, the net earnings of some or one of the several divisions of the said Toledo, Cincinnati & St. Louis Railroad Company are sufficient, if kept separate, to pay the interest warrants or coupons of the first-mortgage bonds constituting a lien upon such separate division or divisions; but that the said Toledo, Cincinnati & St. Louis Railroad Company claims that the earnings of all the divisions of said road should go into the common fund of said consolidated company, and that no account should be kept of the separate earnings and expenses of each division; and the earnings and income of all of said divisions are now, and ever since said last-mentioned consolidation have been, received and taken by said consolidated company, the said Toledo, Cincinnati & St. Louis Railroad Company, which is hopelessly insolvent, and appropriated to pay the expenses of said consolidated company, and wholly diverted from the payment of the interest or any part thereof due upon the said bonds secured by the several mortgages hereinbefore described and referred to; and your orator further shows

23 that unless a separate account of the earnings and expenses of each of said divisions be carefully kept and preserved it will be impossible to ascertain whether any interest shall have become due and payable upon the income bonds hereinbefore mentioned or described.

Wherefore, and forasmuch as your orator is without remedy at law, your orator brings this its bill of complaint in behalf of all the holders of bonds and coupons secured by said mortgage first herein mentioned, and prays that Grenville D. Braman, who claims some interest, and the said Toledo, Delphos & Burlington Railroad Company may be made defendants hereto, and that said consolidated company, the Toledo, Cincinnati & St. Louis Railroad Company, may be made to answer as to its interest; that process of subpœna may be made to issue against each of them, and that they be required to make answer respectively to all and singular the allegations and charges herein contained; that the said mortgaged property be sold at a judicial sale, free of the claims of all the parties hereto, upon such terms and conditions as this honorable court may deem most to the interest of the holders of said first-

mortgage bonds and coupons, and that out of the proceeds of
24 said sale the amount of bonds and interest secured by said first mortgage or deed of trust to your orator may be paid to your orator for the holders thereof respectively, and that the balance, if any, of said proceeds of sale may be paid to your orator as trustee for the holders of said bonds and coupons secured by said second mortgage of said main-line division in order of priority, and that meanwhile and until such sale a receiver may be appointed of all and singular the premises and property aforesaid embraced within the said mortgage or deed of trust hereinbefore first set forth, and that he may be authorized and empowered to maintain and operate said railroad of said main-line division, and to exercise all the powers usually granted to receivers, and to receive and to collect all the rents and other income from any of the said mortgaged property, and to preserve the same and all parts of said mortgaged premises and property from waste and loss, and to make such payments and carry out and perform such contracts and agreements as may be to the interest of said several parties interested in said railroad, and for such other and further relief as to the court shall seem to be just and according to equity and good conscience.

25 BUTLER, STILLMAN & HUBBARD,
HOADLY, JOHNSON & COLSTON,
BAKER, HORD & HENDRICKS,
Counsel for Central Trust Company of New York.

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York, City and County of New York, } ss:

Henry F. Spaulding, being duly sworn, says that he is the president of The Central Trust Company of New York, the complainant in the above bill; that the said bill is true of his own knowledge except as to those matters which are therein stated to be upon information and belief, and as to those matters he believes it to be true.

HENRY F. SPAULDING.

Sworn to before me this 13th day of October, 1883.
[SEAL.] EDWARD L. ORISON,
U. S. Commissioner for the Southern Dist. of New York.

26 And afterwards, to wit, at the November term of said court, on the 5th day of December, 1884, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Now, on this 5th day of December, A. D. 1884, this cause came on to be heard upon the application of James M. Quigley, Charles T. Harbeck, and John McNab, committee and trustees for Toledo, Delphos and Burlington Railroad Company first-mortgage bondholders, made co-complainants in the above-entitled cause by order of this court rendered and entered November 10th, A. D. 1884, for leave to file an amendment to the bill of complaint heretofore filed in this cause

October 20th, 1883, by the Central Trust Company of New York as trustee, which said application being heard by the court the same is now granted, and said co-complainants are now granted leave to file their said amendment to said bill of complaint, which is accordingly done, and is in the words following, to wit:

27 Come now complainants, James M. Quigley, Charles T. Harbeck, and John McNab, and, by leave of court first had and obtained, file the following amendment to the original bill of complaint herein filed October 20th, 1883, by the Central Trust Company of New York, as trustee, to wit:

I. Your orators aver that prior to March, 1878, the Toledo & Maumee Narrow-Gauge Railroad Company, a corporation of the State of Ohio, had organized a railroad company and projected and constructed and was operating a line of road from a point in the city of Toledo, Ohio, to the village of Maumee City, now South Toledo, Ohio, the line of said Toledo & Maumee Narrow-Gauge railroad then running along Park avenue and the side of Broadway, in said city, to a point on said street known as Broadway; that on or about the 25th day of March, 1878, the city of Toledo, by ordinance duly enacted, granted to the said Toledo & Maumee Narrow-

28 Gauge Railroad Company and to the Toledo and Grand Rapids Railroad Company, another corporation of the State of Ohio, the right of way over and upon and the right to construct and operate a railroad through and upon Canal avenue, an alley lying between Vinton street and the Miami & Erie canal, Mill street, the northerly thirty (30) feet of the abandoned bed of the Miami & Erie canal, and Washington street from Erie street to Swan creek, in said city of Toledo, which said ordinance of March 25, 1878, was amended and the grant therein contained affirmed by an ordinance of said city duly passed by the common council thereof on the 6th day of October, 1879, and approved by the mayor of said city on the 10th day of October, 1879, to which said ordinances of said city your orators here now beg leave to refer the court with the same force and effect as if the same were here at large set forth; that under said grant of right of way and under other grants of

29 right of way, purchases, and condemnations made by said Toledo & Maumee Narrow-Gauge Railroad Company and its successor by consolidation, the Toledo, Delphos & Burlington Railroad Company, in said city of Toledo said Toledo & Maumee Narrow-Gauge Railroad Company and its successor, the Toledo, Delphos & Burlington Railroad Company, had, prior to the 17th day of January, 1880, constructed and was operating its said line of railway in the said city of Toledo and from said city of Toledo to the village of Maumee City, now South Toledo, Ohio; that said line of railway so constructed and in operation belonging to and the property of the said Toledo & Maumee Narrow-Gauge Railroad Company and its said successor, the Toledo, Delphos & Burlington Railroad Company, extended from the southeasterly end of Washington street, in the city of Toledo, Lucas county, Ohio, thence northwesterly along Washington street to the canal lands, in

said city; thence southwesterly along said abandoned canal
30 lands to Swan creek, in said city; thence over said Swan creek and the Miami & Erie canal and over and along Mill street and Canal avenue, in said city, to the westerly limit thereof, and thence across the westerly limit of said city of Toledo, and thence to the said village of Maumee City, now South Toledo, in said Lucas county, Ohio, and that upon its said right of way and property said Toledo & Maumee Narrow-Gauge Railroad Company and its said successor, the Toledo, Delphos & Burlington Railroad Company, then had constructed and owned certain shops, station grounds, side-track grounds, main track and side tracks, and other terminal facilities at and in said city of Toledo.

II. And your orators further aver that the said Toledo & Grand Rapids Railroad Company did not build, construct, or own any continuous line of railroad upon the right of way granted by said city to the said Toledo & Maumee Narrow-Gauge Railroad Company and the Toledo & Grand Rapids Railroad Company,
31 but that said Toledo & Maumee Narrow-Gauge Railroad Company and its successor by consolidation, the Toledo, Delphos & Burlington Railroad Company, did construct, own, and operate a line of railroad over, along, and upon said right so granted by said city; that said Toledo & Grand Rapids Railroad Company did, as your orators are informed and believe, construct a line of railroad from the end of the said Toledo & Maumee Narrow-Gauge railroad at the village of Maumee City, now South Toledo, Ohio, to Waterville, in said State of Ohio, a distance of about six miles, and that at and prior to the 17th day of January, 1880, said Toledo & Grand Rapids Railroad Company did not own or possess any line of railroad or any railroad property in said city of Toledo other than the right conferred by the city of Toledo to build and operate a line of railroad, as hereinbefore described, in said city jointly with the said Toledo & Maumee Narrow-Gauge Railroad Company, which said grant of right of way was never used by said Toledo & Grand Rapids Railroad Company by the construc-
32 tion and maintenance and operation of any continuous line of railroad thereon.

III. That on or about the first day of May, 1879, the said Toledo & Maumee Narrow-Gauge Railroad Company, the Toledo, Delphos & Indianapolis Railroad Company, a corporation organized and existing under the laws of the State of Ohio; the Delphos & Kokomo Railroad Company, a corporation organized and existing under the laws of the State of Ohio, and the Delphos, Bluffton & Frankfort Railroad Company, a corporation organized and existing under the laws of the State of Indiana, by proper and lawful agreements then made and entered into by and between said several railroad companies, did consolidate the stock and franchises of said several railroad corporations into a single consolidated corporation under the name and style of the Toledo, Delphos & Burlington Railroad Company, said consolidated company then owning and operating a continuous line of road from the point hereinbefore des-

ignated in the city of Toledo to the village of Warren, in
33 the State of Indiana, with an uncompleted line of railroad from said village of Warren, in the State of Indiana, to the city of Kokomo, in said State of Indiana; that by said consolidation the said consolidated company, the Toledo, Delphos & Burlington Railroad Company, became the owner of all the railroad property, rights of way, tracks, side tracks, depot grounds, station grounds, shops, machinery, and all terminal facilities of and belonging to the said Toledo & Maumee Narrow Gauge Railroad Company, subject only to the then outstanding debts and obligations of the said Toledo & Maumee Narrow-Gauge Railroad Company; that on the 17th day of January, 1880, the said consolidated company, the Toledo, Delphos & Burlington Railroad Company, executed its first mortgage or trust deed to secure the payment of $1,250,000 of bonds, conveying by said trust deed to the Central Trust Company of New York all of its said line of railroad completed and projected from said city of Toledo to the city of Kokomo, in the State of Indiana, together with all and singular
34 the rights of way, road-bed, made or thereafter to be made, its tracks, side tracks, stations, depot grounds, sidings, bridges, rails, fences, machine shops, buildings, superstructures, and erections in any manner then appertaining to or which should thereafter appertain unto said line of railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures which were then or should be at any time thereafter held, owned, or acquired by the said railroad company for use in connection with its said railroad, and all its depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other terminal facilities; that said mortgage or trust deed was duly recorded in each of the several counties into and through which said line of railroad ran, as set forth in the second paragraph of the original bill of complaint filed herein by the Central Trust Company of New York; that said mortgage was duly recorded in the county of Lucas and State of Ohio on the 21st day January, 1880; that said Central Trust
35 Company accepted said trust and certified the said bonds issued under trust deed, which said bonds are now outstanding; that on said 17th day of January, 1880, the said Toledo, Delphos & Burlington Railroad Company, by proper corporate action, did make, execute, and deliver to the said Central Trust Company its certain other deed of trust or mortgage to secure the payment of $1,250,000 of other bonds known as "income bonds;" that said Central Trust Company accepted said trust and certified said bonds, and that the same have been issued and are now outstanding.

IV. And your orators aver that said first mortgage of the Toledo, Delphos & Burlington Railroad Company hereinbefore described is a first and paramount lien upon all the railroad, rights of way, grounds, superstructures, buildings, property, and terminal facilities of any and every kind and nature whatsoever at any time belonging to the Toledo & Maumee Narrow-Gauge Railroad Company and at any time owned or acquired by the said Toledo, Delphos & Bur-

lington Railroad Company at and within the said city of To-
36 ledo, State of Ohio, whether owned or acquired before or since the execution of said first mortgage of January 17, 1880.

And your orators further aver that the said second mortgage or trust deed executed to secure the said bonds known as "income bonds" is a second lien upon all of said property belonging to either the Toledo & Maumee Narrow-Gauge Railroad Company or to the Toledo, Delphos and Burlington Railroad Company by its said consolidation and upon all the property and rights conveyed to and acquired by said Toledo, Delphos and Burlington Railroad Company at any time since said consolidation.

V. Your orators further aver that after said Central Trust Company of New York had accepted the trust in said two mortgages described in the fourth paragraph of this amendment and after the said bonds secured by said two mortgages had been issued and were outstanding, to wit, on the 21st day of June, 1880, the said Toledo, Delphos & Burlington Railroad Company executed its certain
37 other mortgage, known as the "terminal trust mortgage," by which said railroad company attempted to secure the payment of $250,000 of bonds, known as "series A, terminal trust first-mortgage bonds," by conveying and mortgaging all of its railroad, rights of way, property, and terminal facilities at and within the corporate limits of the said city of Toledo, State of Ohio; that in said terminal trust mortgage said Central Trust Company of New York was made trustee; that said Central Trust Company accepted said trust and certified said bonds, and your orators are informed and believe that the same have been issued and are now outstanding; but your orators aver that said terminal trust bonds and said terminal trust mortgage are not a first and prior lien upon any of the railroad, rights of way, property, and terminal facilities of the said Toledo, Delphos & Burlington Railroad Company at and within said city of Toledo, but that said terminal trust mortgage and said bonds issued thereunder are subject and junior to the said first mortgage executed on January 17, 1880, and the bonds
38 issued thereunder, and are subject and junior to the said second mortgage executed by said Toledo, Delphos & Burlington Rialroad Company on said 17 day of January, 1881, to secure the income bonds as hereinbefore set forth; and your orators aver that they are informed and believe that the holders of the bonds issued under said terminal trust mortgage and the Central Trust Company, as trustee in said terminal trust mortgage, are claiming and asserting that said terminal trust mortgage is a first and paramount lien upon all the railroad property and terminal facilities of said railroad company at and within said city of Toledo, and that the same is superior in lien to the said first mortgage executed on said 17th day of January, 1880, and that said bondholders are seeking and intending to foreclose their said mortgage and sell said railroad and terminal facilities at and within said city of Toledo to secure the payment of their said bonds, to the great prejudice and injury

of your orators as the holders of the bonds issued under said
39 first mortgage of January 17, 1880, hereinbefore described.

VI. Your orators further aver that on or about the 12th day of April, 1881, the said Toledo & Grand Rapids Railroad Company conveyed all of its line of railroad and property by proper deed of conveyance to the said Toledo, Delphos & Burlington Railroad Company, but that prior to said conveyance, to wit, on the 4th day of September, 1880, said Toledo & Grand Rapids Railroad Company made and executed its certain pretended mortgage and trust deed pretending to convey to the said The Central Trust Company of New York all of its railroad, rights, and property at and within the said city of Toledo, but your orators aver that said Toledo & Grand Rapids Railroad Company owned and possessed at said date last named no railroad, buildings, superstructures, property, or terminal facilities at and in said city of Toledo other than the naked grant by said city to construct and operate a line of railroad on and along Canal avenue, in said city, jointly with the said Toledo
40 & Maumee Narrow-Gauge Railroad Company, as hereinbefore set forth, and therefore your orators aver that said pretended mortgage of September 4, A. D. 1880, conveyed nothing to said Central Trust Company excepting only said unused grant of said city of Toledo.

VII. Your orators further aver that all the railroad, property, rights, and terminal facilities alleged to be covered by the said terminal trust mortgage were owned by and in the possession of and were being used by the said Toledo, Delphos & Burlington Railroad Company at the time of the execution of the said mortgage of January 17, 1880, and at the time the said bonds held and represented by your orators were issued under said first mortgage or have been acquired by the said Toledo, Delphos & Burlington Railroad Company and its successor by consolidation, the Toledo, Cincinnati & St. Louis Railroad Company, since the execution of said first mortgage of January 17, 1880, and are all subject to said mortgage as a first and paramount lien thereon.

41 Your orators would further show the court that since the execution of their said first mortgage, to wit, on or about the 9th day of September, 1880, the said Toledo, Delphos & Burlington Railroad Company bought of the city of Toledo a large and valuable tract of land in said city adjoining and adjacent to the right of way of said railroad, paying said city therefor the sum of $10,000.00, a more particular description of which said lands is as follows, to wit: All that part of the lands known as the Manhattan Branch of the Miami & Erie canal, now abandoned, which are included and lie between Swan creek and Washington street, in the city of Toledo, Lucas county, State of Ohio, not heretofore sold, and especially excepting a certain part of said lands lying between Erie and Washington streets, as above, deeded by the said city of Toledo, on the 10th day of March, A. D. 1880, to Mary Bodette; also excepting that portion of said described lands heretofore set apart for railroad purposes by the city of Toledo by ordinance of the common

council of the city of Toledo passed October, A. D. 1879; and
42 that said Toledo, Delphos & Burlington Railroad Company, by and through its agent, George William Ballou, made defendant hereto, purchased and acquired certain other valuable lands and rights in said city of Toledo, all of which your orators are not able to describe with particularity, but part of which are described as follows:

The northeast 90 feet of the north half of lot 290, in the Port Lawrence division of the city of Toledo, Lucas county, Ohio, being 30 feet front on Washington street and extending back in depth 90 feet; also that part of lot 17, river tract nine, township three, U. S. reserve, &c., described as commencing on the east line of river tract nine aforesaid at a point 356 feet north from the center of South street of said city, running thence westerly and parallel with the said center of said South street to the southeast line of Canal avenue extended; thence southwest along the southeast line of said Canal avenue extended to the west line of said lot 17; thence north along said west line to the Wabash & Erie
43 canal; thence northeast along the line of the canal to the east line of said river tract nine; thence south along the said east line to the place of beginning, containing five and nine-tenths acres, more or less; also lots number- 69 to 98, both inclusive, of the East South Street Addition to the city of Toledo, Lucas county, Ohio; also that part of lot number 15, in river tract ten, U. S. reserve, &c., between Miami & Erie canal and a line parallel thereto 400 feet southeasterly therefrom, which said lands your orators aver are subject to the lien of their said mortgage of January 17, 1880, as after-acquired property of said Toledo, Delphos & Burlington Railroad Company.

Your orators would further aver that several other pieces of property of great value to said railroad company have, since the execution of said mortgage of January 17, 1880, been purchased or condemned or contracted for to enable the said Toledo, Delphos & Burlington Railroad Company and its successor, the Toledo, Cincinnati & St. Louis Railroad Company, to extend its tracks to the
44 navigable portion of the river in said city of Toledo; that your orators are unable to particularly describe said lands, rights of way, and privileges, but aver that the same are of great value, and that they are subject to the lien of the said mortgage of January 17, 1880, as after-acquired property of said railroad company; that your orators are informed and believe that the legal title to some of said lots and lands last above mentioned has been taken in the name of one George William Ballou, an officer or agent of said Toledo, Delphos & Burlington Railroad Company and its successor by consolidation, the Toledo, Cincinnati & St. Louis Railroad Company, but that said lands so conveyed to said Ballou and of which he holds the legal title do in equity belong to and are the property of the said Toledo, Delphos & Burlington Railroad Company and its said successor by consolidation, the Toledo, Cincinnati & St. Louis Railroad Company, and are subject to your orators' said mortgage,
45 the same being held only in trust by said Ballou; and your ora-

tors aver that a partial and the best description of which they are capable of said lands and rights, the title to which was taken and is held by Ballou in his own name, and of which the said Toledo, Delphos & Burlington Railroad Company and its said successor by consolidation, the Toledo, Cincinnati & St. Louis Railroad Company, are the equitable owners, and which said lands, your orators aver, are held only in trust for said railroad companies by said Ballou and are subject to the said first mortgage of January 17. 1880, is as follows, to wit: 1. Lots number- 65, 66, 67, & 68 of Shaw's & Wells' Addition to the city of Toledo, Lucas county, Ohio.

2. Lots 79, 80, 81, 82, 83, & 84 of Shaw's & Wells' 2nd Addition to the city of Toledo, Lucas county, Ohio.

3. Also lots Nos. 8 & 9 of river tract No. 7, in the U. S. reserve of 12 miles square at the foot of the rapids of the Miami of Lake Erie, lying southeasterly of the right of way of the Toledo, Wabash
46 and Western railway, and running from said right of way to the channel of the Maumee river.

4. Being part of lot No. 36, lying on the north west side of Sophia street and on the southeast side of Conant street, in South Toledo, formerly Maumee City, more fully described as follows:

Beginning at a point on the northwesterly side of Sophia street 117 feet southeast from the west corner of Sophia street and Conant street, thence southwesterly along the northwesterly line of said Sophia street a distance of 348 feet, more or less, to the north corner of Sophia and Allen street-; thence in a northwesterly direction along the northeasterly line of Allen street a distance of 250 and $\frac{8}{10}$ feet to a point; thence in a northwesterly direction along a line parallel with the center line of Sophia street a distance of 465 feet, more or less, to the southwesterly line of Conant street; thence in a southeasterly direction along the southwesterly line of Conant street a distance of $184\frac{8}{10}$ feet to a point; thence southwesterly
47 & 48 parallel with the center line of Sophia street 117 feet to a point; thence southeasterly at right angles to the center line of Sophia street, a distance of 60 feet to the northwesterly line of Sophia street, to the place of beginning, the whole containing $2\frac{1}{2}$ acres of land, more or less, situated in Lucas county, Ohio.

5. All that part of lot No. 17, in river tract No. 9, in the U. S reserve of 12 miles square at the foot of the rapids of the Miami of Lake Erie, which lies between the tract of the Wabash, St. Louis & Pacific railway and the Maumee river, all in the city of Toledo, Lucas county, Ohio, excepting all rights belonging and attached to said above-described lands in and to the riparian rights of the island in the Maumee river, which rights are reserved to the benefit of Isaac M. Poe, a former grantor of said lands.

6. All that portion of lot No. 15, in river tract No. 8, in the U. S. reserve of 12 miles square at the foot of the rapids of the Miami of Lake Erie, which lies between the land owned by the Toledo,
49 Wabash & Western Railway Company and the Maumee river, together with all the riparian rights belonging to the same, said land being situated in the city of Toledo, Lucas county, Ohio; the conveyances to which said lands and premises last above de-

scribed and mentioned the said Ballou took in his own name and to himself as legal owner thereof while he was acting as the financial agent and trustee for the said Toledo, Delphos & Burlington Railroad Company and its successor, the Toledo, Cincinnati & St. Louis Railroad Company, without right and in violation of his duty and obligations as such financial agent and trustee aforesaid, all payments upon said lands and premises being made by said Ballou out of funds belonging to said railroad company.

Your orators further show that they are informed and believe that the said Ballou and Margaret C. Ballou, his wife, on or about the 29th day of November, 1880, by a pretended mortgage or
50 conveyance of some sort, pretended to convey certain of said property of which he so held the legal title to the Central Trust Company of New York for a consideration of $40,000.00 face value of said terminal bonds; but your orators aver that said transaction and said pretended mortgage were without authority of law and are invalid and void.

And your orators further aver that they are informed and believe that E. B. Phillips, Charles L. Luce, John T. Newton, Martha Stebbins, George Stebbins, and Thomas H. Hamilton are asserting and claiming some right or interest in some of the lands and property in the city of Toledo belonging to and equitably the property of the said Toledo, Delphos & Burlington Railroad Company and its successor, the Toledo, Cincinnati & St. Louis Railroad Company, and subject to said first mortgage of January 17, 1880, wherefore they are made defendants to answer as to any right or interest claimed by them or either of them.

51 VIII. Your orators would further show that after the execution of said mortgage of January 17, 1880, by said Toledo, Delphos & Burlington Railroad Company upon its road and property extending from said city of Toledo, Ohio, to said city of Kokomo, Indiana, about $240,000.00 of the cash proceeds of the sale of said bonds issued under said first mortgage was expended in constructing what was called the "Kokomo Extension," which was the line of said railroad from the village of Warren, in the State of Indiana, to the city of Kokomo, in said State of Indiana; that said extension was so built and constructed with the cash proceeds of the sale of said first-mortgage bonds of said Toledo, Delphos & Burlington Railroad Company, but that the said line of railroad from Warren to Kokomo aforesaid was constructed under the franchises of a corporation of the State of Indiana known as the Frankfort,
52 St. Louis and Toledo Railroad Company, which said last-named company was not taken into the consolidation forming the said Toledo, Delphos & Burlington Railroad Company; but your orators aver that on or about March 27, 1880, the said Frankfort, St. Louis & Toledo Railroad Company made and entered into a contract with a building firm known as H. R. Low & Company for the building of its line of road between said village of Warren and said city of Kokomo, by the terms and conditions of which said contract the said H. R. Low & Company were to receive in full payment for the construction and equipment of

said road (1) the local aid voted thereto by the municipalities along the line of said road and local contributions to the amount in the aggregate of four thousand dollars per mile; (2) the first-mortgage bonds of said Frankfort, St. Louis & Toledo Railroad Company to the amount of six thousand dollars per mile; (3) eight hundred thousand dollars of the capital stock of said
53 Frankfort, St. Louis & Toledo Railroad Company, the same being by the terms of said contract all of the capital stock thereof; that after making and entering into said contract with said Frankfort, St. Louis & Toledo Railroad Company the said contractors, H. R. Low & Company, under the firm name and style of A. G. Wells & Company, the partners in both firms being the same persons, entered into a contract on July 8, 1880, with said Toledo, Delphos & Burlington Railroad Company for the building of the same line of road, to wit, from the village of Warren to the city of Kokomo, by the terms of which said contract the said Toledo, Delphos & Burlington Railroad Company agreed to pay to the said A. G. Wells & Company $5,000.00 per mile, in cash, for the construction of said railroad from Warren to Kokomo, and said Toledo, Delphos & Burlington Railroad Company, in addition to the said sum of $5,000.00 per mile, to be paid in cash to said A. G. Wells & Company, further agreed that there should also
54 be paid to said A. G. Wells & Company all local aid of any kind, but without endorsement or guaranty of the said Toledo, Delphos & Burlington Railroad Company to the said A. G. Wells & Company; and the said A. G. Wells & Company upon their part agreed, for said consideration to be paid to them, as above set forth, by the said Toledo, Delphos & Burlington Railroad Company, that they, the said A. G. Wells & Company, would procure and vest in the said Toledo, Delphos & Burlington Railroad Company, by a good and indefeasible title, free from conditions or encumbrances, a right of way sixty (60) feet in width, thirty (30) feet on each side of the center line of the railroad, with such additional widths as might be necessary for turnouts, sidings, transfers, depots, water stations, and burrow pits, which right of way said A. G. Wells & Company agreed should be thoroughly cleared of all standing timber, all brush, logs, useless timber, or rubbish of any kind
55 should be burned up or removed, and all standing trees outside of the right of way, that might endanger the track by falling, should be chopped down; and said A. G. Wells & Company further agreed by their said contract to pay for and convey to the said Toledo, Delphos & Burlington Railroad Company depot grounds of such size and at such points as should be designated by the said railroad company, said depot grounds to be of sufficient size and so located as to enable the company to do the business at the particular stations conveniently and well: Provided, however, that in towns and villages where said railroad should run through streets or alleys a right of way not less than sixteen (16) feet in width should be procured, the title thereto to be the best which the municipality and the adjacent owners could grant, and free from conditions or requirements that

would interfere with the safe, convenient, and economical
56 operation of the railroad, said contract further providing that the said railroad should be built and constructed in a substantial and workmanlike manner, to be laid with iron rails of approved pattern, weighing forty (40) pounds to the lineal yard, joined with fish-plates and bolts, said track to be laid with three thousand (3,000) ties to the mile, evenly spread at right angles to said track; that by their said contract the said A. G. Wells & Company, in addition to procuring and vesting in said Toledo, Delphos & Burlington Railroad Company the right of way, depot grounds, station grounds, and other real estate, and in addition to the procurement of all material and construction of said railroad, further contracted and agreed to deliver to said Toledo, Delphos & Burlington Railroad Company all of the bonds issued by the Frankfort, St. Louis & Toledo Railroad Company and all of the capital stock of said Frankfort, St. Louis
57 & Toledo Railroad Company, excepting only that paid for local aid, and agreeing that the amount of capital stock so delivered by said A. G. Wells & Company to the said Toledo, Delphos & Burlington Railroad Company should be above two-thirds of the total amount of capital stock issued by said Frankfort, St. Louis & Toledo Railroad Company; and said A. G. Wells & Company further, by their said contract and in consideration of the payments to be made to them by the said Toledo, Delphos & Burlington Railroad Company, agreed and contracted to pay and discharge all the liens and floating debt of said Frankfort, St. Louis & Toledo Railway Company, so that when said railroad should be completed and delivered to said Toledo, Delphos & Burlington Railroad Company said Frankfort, St. Louis & Toledo Railroad Company should have no debts outstanding except only its said bonds, delivered by said A. G. Wells & Company to the said Toledo, Delphos & Burlington Railroad
58 Company; and said A. G. Wells & Company further agreed to procure the directors of said Frankfort, St. Louis & Toledo Railroad Company, one by one, to resign, and that they would procure the election of a board of directors to be designated by the said Toledo, Delphos & Burlington Railroad Company or its board of directors or officers; that said line of road between Warren and Kokomo was constructed by said A. G. Wells & Company under the said last-named contract between said A. G. Wells & Company and the Toledo, Delphos & Burlington Railroad Company; and your orators are informed and so aver that the said A. G. Wells & Company did in all things comply with their said contract, and did pay off and satisfy all claims and floating debt against the said Frankfort, St. Louis & Toledo Railroad Company, and did deliver to said Toledo, Delphos & Burlington Railroad Company more than two-thirds of the capital stock issued by said Frankfort, St. Louis & Toledo Railroad Company, as by said contract required.

59 And your orators further aver that on or about the 17th of September, 1880, the said Frankfort, St. Louis & Toledo Railroad Company executed its mortgage for $264,000.00 to one Conrad N. Jordan as trustee, and caused the same to be duly recorded in the counties through which said line of railroad

runs; and your orators are informed and aver, upon information and belief, that only $90,000.00 of said bonds so provided for by said mortgage were ever issued, and that said $90,000.00 of bonds were issued to H. R. Low & Company under their said contract with the said Frankfort, St. Louis & Toledo Railroad Company, as hereinabove mentioned and described, and that the said A. G. Wells & Company, being the same persons as those composing the firm of H. R. Low & Company, did, under their said contract last above described between them, the said A. G. Wells & Company and the Toledo, Delphos & Burlington Railroad Company, deliver
60 to the proper officer of the said Toledo, Delphos & Burlington Railroad Company the said $90,000.00 of bonds issued by the said Frankfort, St. Louis & Toledo Railroad Company and delivered to them, which said bonds were so delivered by said A. G. Wells & Company to the Toledo, Delphos & Burlington Railroad Company under and pursuant to their said contract, and that no other bonds were ever issued under the said Frankfort, St. Louis & Toledo Railroad Company first mortgage, as your — are informed and believe.

And your orators further show the court that the said $90,000.00 of Frankfort, St. Louis & Toledo Railroad Company first-mortgage bonds issued and delivered to the said Toledo, Delphos & Burlington Railroad Company under said contract between said railroad company and said A. G. Wells & Company are now in the custody and possession of one Herbert Steward, of Boston, an officer of the Toledo, Delphos & Burlington Railroad Company and of its successor, the Toledo, Cincinnati & St. Louis
61 Railroad Company; that said bonds so held by said Steward have never been issued by either the Toledo, Delphos & Burlington Railroad Company or by its successor, the Toledo, Cincinnati & St. Louis Railroad Company, but the same are and were held for cancellation, and your orators make the said Steward, as custodian and possessor of said $90,000.00 of bonds, defendant hereto, and ask the court that said bonds may be brought into court for cancellation.

And your orators would further show the court that afterwards and while the said Toledo, Delphos & Burlington Railroad Company held and owned two-thirds of the capital stock and all the bonds ever issued by the said Frankfort, St. Louis & Toledo Railroad Company, to wit, on the 25th day of February, A. D. 1882, the said Toledo, Delphos & Burlington Railroad Company and the said Frankfort, St. Louis & Toledo Railroad Company entered into a consolidation with the Toledo, Cincinnati & St. Louis Railroad
62 Company of the States of Indiana and Illinois, forming by said consolidation the Toledo, Cincinnati & St. Louis Railroad Company.

And your orators aver that the said line of railroad from Warren to Kokomo was built and constructed with the proceeds arising from the sale of the bonds secured by the said first mortgage of the Toledo, Delphos & Burlington Railroad Company, executed January 17, 1880, and that the said corporate franchises of the said Toledo, Del-

phos & Burlington Railroad Company authorized the construction of a railroad from said village of Warren to said city of Kokomo; and your orators aver that by reason of the facts herein set forth the said Toledo, Delphos & Burlington Railroad Company was at the time of said last-mentioned consolidation the legal owner of two-thirds of the capital stock of said Frankfort, St. Louis & Toledo Railroad Company and the legal and equitable owner of all
63 the bonds ever authorized or issued by said Frankfort, St. Louis & Toledo Railroad Company, and was and is the legal and equitable owner of said line of railroad from said village of Warren to said city of Kokomo aforesaid, and of all and singular the right of way and all depot and station grounds and superstructures of and pertaining to said railroad, and that said line of railroad is subject to the said mortgage or trust deed of January 17, 1880, as a first and paramount lien thereon.

Your orators further aver that they are informed and believe that since his appointment as receiver by the order of this court in this cause William J. Craig, as receiver, has purchased and taken in his own name as such receiver the legal title to certain lots and lands at and within the said city of Toledo for the purpose of providing right of way and grounds for said railroad to approach the river front in said city; and your orators aver that
64 whatever lands have been so bought by said receiver are subject to the lien of the mortgage securing the bonds represented by your orators as a first and paramount lien.

Your orators further show the court that Robert Davidson, John Anderson, Jr., Charles Cameron, John Hauldworth, Louis Leisler, C. F. Bowie, C. H. Bonsfield, James King, P. Rotenburg, O. Dummett, R. A. Muir, and Henry M. Leavitt, describing themselves as holders of bonds issued under said Toledo, Delphos & Burlington Railroad Company terminal trust first mortgage and as subjects of the Kingdom of Great Britain, as co-complainants with the Central Trust Company of New York, as trustee in the terminal trust mortgage, have instituted a certain suit in equity in the United States circuit — for the northern district of Ohio, claiming and asserting that said Toledo, Delphos & Burlington terminal trust first mortgage is a first lien and paramount to the lien of the said
65 first mortgage of January 17, 1880, securing the bonds represented by your orators upon all the line of railroad, rights, lands, property, and terminal facilities of the said Toledo, Delphos & Burlington Railroad Company at and within said city of Toledo, and are seeking to foreclose said terminal trust mortgage as a first and paramount lien upon said property, to the great injury and prejudice of your orators.

And your orators would further show the court that on or about October 20th, 1883, James Stevenson and Jeremiah Dummett, as bondholders holding bonds issued under the said Toledo, Delphos & Burlington terminal trust first mortgage, filed in said United States circuit court for the northern district of Ohio their bill in equity against the Toledo, Delphos & Burlington Railroad Company, the Central Trust Company of New York, and the Toledo, Cincinnati

& St. Louis Railroad Company; by which said bill said bond-
66 holders, Stevenson and Dummett, whose citizenship is to your orators unknown, are claiming and asserting that said terminal trust mortgage is a first lien upon the property and terminal facilities of the said Toledo, Delphos and Burlington Railroad Company at and within said city of Toledo; which said cause has been consolidated with the said suit of said The Central Trust Company of New York to foreclose said terminal trust mortgage.

And your orators further show the court that at the time said two suits last hereinbefore mentioned were brought all of the railroad and property of the Toledo, Cincinnati & St. Louis Railroad Company, successor by consolidation to the Toledo, Delphos & Burlington Railroad Company, was in the possession and under the control and was being operated by a receiver appointed by this court under a bill in equity filed in this court on the first day of August,
67 1883, by Grenville D. Braman against the said The Toledo, Cincinnati & St. Louis Railroad Company and The Toledo, Delphos & Burlington Railroad Company and others.

And your orators would further show that while said railroad and property was so in the possession and under the jurisdiction and control of this court by its receiver appointed in said suit of Braman, to wit, on the 20th day of October, 1883, the Central Trust Company of New York, as trustee of the Toledo, Delphos & Burlington Railroad Company first mortgage dated January 17, 1880, filed its original bill for the foreclosure of said first mortgage; to which said bill this is an amendment filed by leave of court granted to your orators, who have been by proper order of court made co-complainants with said Central Trust Company of New York in said original bill.

And your orators would further show that under said last-
68 mentioned cause and under the bill filed therein by said The Central Trust Company William J. Craig was appointed receiver of all of the said railroad and property covered by said mortgage of January 17, 1880, and is now in possession thereof as such receiver.

IX. Wherefore, and inasmuch as your orators are without remedy at law as to the matters and facts above set forth, your orators file this their amendment to the said original bill of the said Central Trust Company of New York, filed October 20, 1883; and your orators pray that the said George William Ballou and Margaret C. Ballou, his wife, and the said Robert Davidson, John Anderson, Jr., Charles Cameron, John Hauldsworth, Louis Leisler, C. F. Bowie, C. H. Bonsfield, James King, P. Rotenburg, O. Dummett, R. A. Mair, Henry M. Leavitt, James Stevenson, Jeremiah Dummett, E. B. Phillips, Charles Luce, John T. Newton, Martha Stebbins, George Stebbins, Herbert Steward, and the
69 Central Trust Company of New York, as trustee of the Toledo, Delphos & Burlington Railroad Company terminal trust first mortgage and as grantee or mortgagee of George William Ballou and wife and as mortgagee of the Grand Rapids Railroad Company, may each and all of them be made defendants hereto; that process

of subpœna may issue against each of them, and that they be required to make answer respectively to all and singular the allegations, charges, and averments in this amendment contained, but not under oath, answers under oath to this amendment being hereby specifically waived; that the said George William Ballou may be required to answer fully as to any interest he may claim in any lands and property in said city of Toledo, the title to which was taken by him in his own name, purchased and acquired since the consolidation forming the Toledo, Delphos & Burling-
70 ton Railroad Company, said lands having been purchased for railroad uses and terminal facilities of said Toledo, Delphos & Burlington Railroad Company and its successor by consolidation, the said Toledo, Cincinnati & St. Louis Railroad Company; that the said Central Trust Company of New York may be required to make answer as to all the allegations and averments herein contained, and especially as to any right, title, or interest it may have or claim to have in and to any lots and lands conveyed or mortgaged to it by George William Ballou and as to any consideration paid or delivered by said Central Trust Company for such mortgage or conveyance, and also as to any claim asserted by said Central Trust Company that said terminal trust mortgage is prior in lien to the said first mortgage of January 17, 1880, securing the bonds represented by your orators; and, inasmuch as Robert Davidson, John Anderson, Jr., Charles Cameron, John Haulds-
71 worth, Louis Leisler, C. F. Bowie, C. H. Bonsfield, James King, P. Rotenburg, O. Dummett, R. N. Mair, and Henry M. Leavitt represent themselves as being subjects of the Kingdom of Great Britain, your orators pray that if at any time said defendants or either of them come within the proper jurisdiction of this court and within reach of the process thereof that proper subpœnas may issue and be served upon them or either of them so coming within the jurisdiction of this court.

And your orators pray that the said Toledo, Delphos & Burlington Railroad Company first mortgage, executed and dated January 17, 1880, may be held and decreed to be a first and paramount lien upon all the property, railroad, tracks, buildings, superstructures, rights of way, lands, depot grounds, privileges, franchises, and all terminal facilities at and within the said city of Toledo that at any time belonged to or were acquired by the said Toledo &
72 Maumee Narrow-Gauge Railroad Company and that belonged to or were acquired by the said Toledo, Delphos & Burlington Railroad Company and its successor by consolidation, the said Toledo, Cincinnati & St. Louis Railroad Company, and that said first mortgage of January 17, 1880, may be held and decreed to be a lien upon said property superior and paramount to the lien of the said Toledo, Delphos & Burlington Railroad Company terminal trust first mortgage, dated June 21, 1880, and executed July 1, 1880; that the said Herbert Steward may be ordered to bring into court the said bonds issued by the Frankfort, St. Louis & Toledo Railroad Company that said bonds may be cancelled and said mortgage decreed released and satisfied, and that said line of railroad from

Warren to Kokomo may be decreed to be the property of the Toledo, Delphos & Burlington Railroad Company and subject to said mortgage of January 17, 1880, as a first and paramount lien thereon; and your orators pray that the said first mortgage
73 of January 17, 1880, may be foreclosed by proper decree of this court and the said mortgaged property sold and the proceeds of sale applied to the payment of the bonds and coupons secured by said first mortgage of January 17, 1880, as prayed by and in the said original bill of complaint, to which this is an amendment; and your orators pray for all such other and further relief as to the court shall seem to be just and according to equity and good conscience.

McDONALD, BUTLER AND MASON,
Solicitors for Complainants, James M. Quigley, Charles T. Harbeck, and John McNab.

Indianapolis, Ind., December 5, 1884.

And afterwards, to wit, at the November term of said court, on the 12th day of November, 1885, before Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

74 This cause coming on to be heard at this term of this court for final decree, come now complainant The Central Trust Company of New York, by Butler, Stillman & Hubbard, Hoadly Johnson & Colston, and Baker, Hord & Hendricks, its solicitors, and James M. Quigley, Charles T. Harbeck, and John McNab, complainants, by McDonald, Butler & Mason, their solicitors; The Toledo, Cincinnati & St. Louis Railroad Company, by Henry D. Hyde, its solicitor, and Moses Bradford, by William W. Woollen, his solicitor, and Herbert Steward, by Harrison, Miller & Elam, his solicitors, and, it appearing to the satisfaction of the court that on October 27, 1883, the Toledo, Delphos & Burlington Railroad Company entered its full appearance in this cause, the said Toledo, Delphos and Burlington Railroad Company is now in open court three times solemnly called and comes not, but wholly makes default herein, and Granville D. Braman, defendant herein, is now in open court three times solemnly called and comes not, but wholly makes default herein. It is therefore considered, adjudged, and decreed by the court that the matters and facts averred in the complainants' original bill of complaint and amendment thereto are taken as confessed and
75 true as against said defaulting defendants, the said Toledo, Delphos & Burlington Railroad Company and Grenville D. Braman; and now, on motion, Robert Davidson, John Anderson, Jr., Charles Cameron, John Hauldsworth, Louis Leisler, C. F. Bowie, C. H. Bonsfield, James King, P. Rotenburg, O. Dummett, E. B. Phillips, Charles Luce, John T. Newton, Martha Stebbins, George Stebbins, George William Ballou, and Margaret C. Ballou are dismissed from this cause as defendants thereto; and now this cause is set down for hearing and decree upon the original bill and amendment thereto, and the answers and replications thereto, and the cross-bill of said Bradford, and complainants' motion to dismiss the

same, and upon the exhibits filed with the original bill and amendment thereto, the documentary evidence, reports of masters, and testimony taken and filed in court in this cause, and the stipulations on file and of record, and, the cause having been argued by counsel, *and* the court, being fully advised, doth find the equity of the case to be with the complainants, and that all and singular the allegations, averments, and charges in the original bill of complaint and the amendment thereto are true, and thereupon the court finds and decrees as follows:

76 1st. The court finds and decrees that the complainants' motion to dismiss the cross-bill of Moses Bradford be, and the same is hereby, sustained, and said cross-bill of Moses Bradford is hereby dismissed at the cost of said cross-complainant, Moses Bradford.

2nd. That on the 17th day of January, 1880, the Toledo, Delphos and Burlington Railroad Company, a corporation created by and existing under the laws of the States of Ohio and Indiana, formed by the consolidation of certain corporations theretofore existing, known as the Toledo & Maumee Narrow-Gauge Railroad Company, the Toledo, Delphos & Indianapolis Railway Company, the Delphos & Kokomo Railway Company, and the Delphos, Bluffton & Frankfort Railroad Company, was engaged in the construction and equipment of a line of railroad from Toledo, Ohio, to Kokomo, Indiana; that on said last-mentioned day said Toledo, Delphos & Burlington Railroad Company, by its president and secretary, under its corporate seal and in pursuance of a resolution to that end duly adopted by the board of directors of said corporation on the 12th day of December, 1879, which resolution was thereafter and before the

77 execution of the bonds and mortgage hereinafter mentioned duly ratified by the vote of a majority of the stockholders of said corporation at a meeting duly convened and held on the 17th day of January, 1880, said Toledo, Delphos & Burlington Railroad Company did execute its one thousand two hundred and fifty bonds, for the sum of $1,000 each, dated the first day of January, 1880, payable on the first day of January, 1910, bearing six per cent. interest per annum, payable semi-annually on the first days of January and July in each and every year at the city of New York, each of said bonds having interest warrants or coupons for the payment of the interest as aforesaid attached thereto, and that the said Toledo, Delphos & Burlington Railroad Company issued and sold said one thousand two hundred and fifty bonds, with said interest warrants or coupons attached thereto, all of which said bonds were, before the same were issued, duly certified by the complainant The Central Trust Company of New York, and said bonds are now in the hands of divers and sundry persons as holders thereof, and that with the proceeds of sale of said bonds the said corporation proceeded to construct, equip, maintain, and operate said railway.

78 3rd. That to secure the payment of said bonds and coupons the said Toledo, Delphos & Burlington Railroad Company did, on the said 17th day of January, 1880, in pursuance of the provisions of the said resolution, execute and deliver unto The Central Trust

Company of New York, complainant herein, a corporation created by and existing under the laws of the State of New York, and a citizen of said State, a certain deed or indenture of trust and mortgage, which was duly recorded in the counties of Lucas and Henry, Ohio, on January 21, 1880; in the counties of Wood and Putnam, Ohio, on January 22, 1880; in the counties of Allen and Van Wert, Ohio on January 23, 1880; in the counties of Adams and Wells, Indiana, on January 24, 1880; in the counties of Huntington and Wabash, Indiana, on January 26, 1880; in the counties of Grant and Howard, Indiana, on January 27, 1880, and in the county of Miami, Indiana, on January 28, 1880; in and by which said deed of trust and mortgage the said railroad company conveyed unto The Central Trust Company of New York, complainant herein, and to its successor or successors in trust and for the uses and purposes thereby created

79 all and singular the line of railroad of the said Toledo, Delphos & Burlington Railroad Company, as the same then was or might thereafter be constructed between Toledo, Lucas county, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen, and Van Wert, in the State of Ohio, and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant, and Howard, in the State of Indiana, to the city of Kokomo, Indiana, being about one hundred and eighty miles in length, together with all and singular the right of way, road-bed made or to be made, track laid or to be laid between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections, in any way then or thereafter appertaining unto said railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures then or at any time thereafter held, owned, or acquired by the said railroad company for use in connection with its line of railroad aforesaid, and all depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other terminal facilities then or thereafter owned by the said railroad company, together with all and singular the powers and franchises belonging thereto and the tolls, income, and revenue to be levied by and derived therefrom.

80 4th. That after the execution and delivery of said deed of trust and mortgage and the issuing of the said bonds and coupons secured thereby, to wit, in the month of February, 1882, the said Toledo, Delphos & Burlington Railroad Company entered into an agreement of consolidation by and between said last-named company and the Frankfort, St. Louis & Toledo Railroad Company, a corporation of the State of Indiana, and the Toledo, Cincinnati & St. Louis Railroad Company, a corporation created by and existing under the statutes of the States of Indiana and Illinois, said consolidation to take the name of the Toledo, Cincinnati & St. Louis Railroad Company, which said consolidation went into force and took effect on or about the 28th day of February, 1882, the same having been duly ratified by the directors and stockholders of said several companies in accordance with law; that by said consolidation the said constituent companies entering into the same became one corporation, under the name and style of

the Toledo, Cincinnati & St. Louis Railroad Company, by means of which said consolidation and by virtue of the laws in that behalf enacted the said new company became vested with all and
81 singular the property, estate, privileges, and franchises of each and every of the said constituent corporations entering into said consolidation, and subject to all the debts, liabilities, and obligations of said constituent corporations entering into said consolidation.

5th. It is further adjudged and decreed by the court that the said deed of trust and mortgage of January 17, 1880, is a valid conveyance for the purposes therein mentioned, and that the same covers, embraces, and conveys all the said railroad, property, and franchises owned or acquired by the said Toledo, Delphos & Burlington Railroad Company at the date of the execution and delivery of said deed of trust and mortgage and all the railroad property owned or acquired by said Toledo, Delphos & Burlington Railroad Company or by its successor by consolidation, the Toledo, Cincinnati & St. Louis Railroad Company, since the execution and delivery of said deed of trust and mortgage of January 17, 1880, embraced in the description in and conveyed by said deed of trust and mortgage as hereinabove set forth, and that the said deed of trust and mortgage is a first and paramount lien upon
82 the entire line of railroad, property, rights, and franchises therein described and thereby conveyed, and is entitled to priority in the distribution of the proceeds of any sale of said property covered and conveyed thereby, to be made pursuant to this decree, over any other claim or lien against the same, except as hereinafter set forth and provided.

6th. Pursuant to the consent, order, and decree rendered and entered herein on the 5th day of Nov., 1885, by and between the complainants herein and Herbert Steward, defendant herein, it is ordered and decreed that the said Herbert Steward do forthwith deposit in the registry of this court all of the bonds of the Frankfort, St. Louis and Toledo Railroad Company, including the bonds certified by the trustee in said bonds and the uncertified and unissued bonds, and any and all books, papers, stock books, certificates of stock, memoranda, or entries of any and every kind pertaining to the said Frankfort, St. Louis & Toledo Railroad Company now in his possession or under his control, and that thereupon the said Herbert Steward be dismissed as defendant in this cause at the cost of complainants.

And it is further adjudged and decreed by the court that
83 the averments of the amendment to the original bill of complaint herein as to said bonds and stocks of said Frankfort, St. Louis and Toledo Railroad Company are true, and that the same became, by reason of the facts in said amendment averred, the property of the Toledo, Delphos and Burlington Railroad Company, and that, by reason of the facts in said amendment averred, the said first deed of trust and mortgage of the said Toledo, Delphos & Burlington Railroad Company of January 17, 1880, became and is a first and paramount lien on all of the said railroad and property as

now constructed and existing between Warren and Kokomo, in the State of Indiana, and that upon and after sale and conveyance under this decree the said Frankfort, St. Louis & Toledo Railroad Company bonds and stock shall be by the masters making such sale properly marked as cancelled, and that the same shall be and remain in the registry of this court after such cancellation.

7th. The court further finds that the said Toledo, Delphos & Burlington Railroad Company, proper corporate action for that purpose having first been had, did, on said 17th day of January, 1880, execute and deliver to the said complainant herein,
84 The Central Trust Company of New York, as trustee, its certain other deed of trust or mortgage bearing date on that day, whereby it granted, bargained, sold, and conveyed to said trustee all the railroad, property, rights, franchises, goods, and chattels described or mentioned in the said first deed of trust and mortgage hereinabove mentioned, then owned or thereafter to be acquired, to secure the payment at maturity of the principal of one thousand two hundred and fifty bonds of said company, known as "income bonds," each for $1,000, said bonds payable on the first day of January, 1910, and all such interest thereupon as might become due thereon according to the tenor and effect of said last-mentioned bonds and mortgage; that by said last-mentioned bonds and mortgage it was expressly agreed that the interest upon said last-mentioned bonds was not to be due or payable except out of net earnings of said railroad company applicable to such purpose, as in said income mortgage provided.

The court further finds that the said one thousand two hundred and fifty bonds secured by said first deed of trust and mortgage made by said Toledo, Delphos & Burlington Railroad
85 Company to the said Central Trust Company of New York, together with all the installments of interest thereon from and after the interest coupons falling due January 1, 1883, together with interest upon said defaulted coupons, remains wholly unpaid; and the court further finds that demand for the payment of said several installments of interest now in default was duly made at the date of the maturity of said interest coupons, and payment thereof was then and there refused; and the court further finds that prior to the filing of the said original bill of The Central Trust Company of New York, complainant herein, the holders of more than one-half of said bonds had made demand in writing on said Central Trust Company of New York to proceed to the foreclosure of said mortgage. Wherefore the court finds that the principal of said bonds has become due and payable, and that the said first trust deed and mortgage be foreclosed and said railroad, property, rights, and franchises thereby covered and conveyed be sold, and that the proceeds arising from such sale be distributed as hereinafter provided.

8th. The court further finds and decrees that there is now
86 due and owing for principal and interest upon said bonds and coupons secured by said first deed of trust and mortgage the sum of one million five hundred and twenty-four thousand and

eighty-five dollars, and that said deed of trust and mortgage is a first and paramount lien on all the property therein described and thereby conveyed, subject only to such court and receiver's indebtedness as has been or may hereafter be adjudged and decreed as prior in equity and lien to the lien of said first trust deed and mortgage.

9th. It is therefore considered, adjudged, and decreed by the court that the defendants, the said Toledo, Delphos & Burlington Railroad Company and the said Toledo, Cincinnati & St. Louis Railroad Company, do pay to said complainant, The Central Trust Company of New York, the said amount hereinabove found to be due on the debt secured by said first trust deed and mortgage made to said Central Trust Company of New York on the 17th day of January, 1880, to wit, the sum of one million five hundred and twenty-four thousand and eighty-five dollars, together with interest thereon, at the rate of six per centum per annum, from and after the date of this decree, together with the costs of this suit, taxed at —, within five days
87 from and after the date of the entry of this decree, and that in default of such payment by said defendants or either of them within said five days, then and in that case that said second or income mortgage bondholders do pay, within ten days from and after the date of this decree, the said amounts above found due on the debt secured by said first deed of trust and mortgage made to said Central Trust Company of New York on the 17th day of January, 1880, together with interest thereon, at the rate of six per cent. per annum, from and after the date of this decree, together with costs of this suit, taxed at —, and that in default of such payment by said defendants or either of them and by said income mortgage bondholders it is further ordered, adjudged, and decreed that the equity of redemption of said defendants herein in and to said mortgaged property be forever barred and foreclosed, and that all and singular the said railway and property covered and conveyed by said first trust deed and mortgage to said Central Trust Company of New York, including the rights of way thereof, the road-bed thereof, the superstructures of all sorts thereon, its water and other stations and shops, the lands and grounds connected therewith, and tools or implements owned or provided
88 to be used thereon and therein and in constructing and repairs to cars and machinery for said road or the track and the superstructures aforesaid, and all fixtures or superstructures of whatever name or nature and the lands and grounds connected therewith used or provided to be used in operating said road, wherever situated, including all terminal facilities then or thereafter owned and provided to be used in the operation of said railroad, and all cars, engines, and rolling stock belonging to said defendant companies or either of them, and all supplies and other things provided by the said companies defendant or either of them or by the receiver appointed under the order of this court to be used in operating said railroad, together with all corporate franchises of said defendant companies and of each and every of the original constituent companies entering into the various consolidations forming the said Toledo, Delphos & Burlington Railroad

Company and its successor, the said Toledo, Cincinnati & St. Louis Railroad Company, including the rights and franchises of said several companies, be sold as hereinafter ordered and directed and as an entirety, the same being, in the opinion and judgment of
89 this court, incapable of being sold separately or in divisions without material injury to the value thereof.

And it is further ordered and decreed that the said mortgaged property be sold without appraisement and without reference and not subject to the law or laws of the States of Indiana, Illinois, and Ohio touching rights of redemption from mortgage sales.

10th. And the court further orders, adjudges, and decrees that all and singular the property and effects, rights, and franchises of the said Toledo, Delphos and Burlington Railroad Company and its successor, the Toledo, Cincinnati and St. Louis Railroad Company, and of the said original constituent companies so ordered to be sold as aforesaid shall be sold by William P. Fishback and John McMasters, special masters in chancery now appointed by this court to make said sale, and a certified copy of this decree delivered to said masters shall be their authority for the making of said sale.

11th. It is further ordered, adjudged, and decreed by the court that the said masters in chancery, before offering said property, franchises, and premises for sale, shall advertise the time, place, and terms of such sale, together with a brief general description
90 of such property, in one newspaper published in the city of New York, in the State of New York; one published in the city of Boston, Massachusetts; one published in the city of Toledo, in the State of Ohio; one published in the city of Indianapolis, in the State of Indiana, and one published in the city of Springfield, in the State of Illinois, on-e each week for four consecutive weeks, the first insertion of which advertisement and notice shall not be less than thirty days before the day of such sale, and that such sale shall be made by public auction to the highest bidder at the door of the United States circuit court room, in the city of Indianapolis, in the county of Marion, in the State of Indiana; and the said masters in chancery are hereby ordered and directed to require a deposit of thirty-five thousand dollars ($35,000) to be made by each and every such bidder or bidders before receiving any bid from such bidder or bidders, which deposit shall be absolutely forfeited to the use of the trust in the hands of the said complainant, The Central Trust Company of New York, if the bidder to whom the property shall be struck off shall fail to pay or complete the said purchase in accordance with the terms of said sale and the orders and decrees of this court.

91 It is further ordered, adjudged, and decreed that in making such sale the said masters shall not receive or cry any bid for a sum less than six hundred thousand dollars ($600,000.)

12th. It is further ordered, adjudged, and decreed by the court that within twenty days from and after the confirmation of such sale made under this decree the purchaser or purchasers shall pay of the unpaid purchase-money for which said property is sold a sum sufficient, taken together with the said thirty-five thousand dollars

paid at the time of such sale, to pay and discharge the court costs, the masters' fees, solicitors' fees, counsel fees, and the claims and debts, including taxes legally due upon said property, that shall have been then and prior thereto found and determined and finally adjudged and decreed to be due and payable as court and receiver's indebtedness and to be prior and superior in equity to lien of said first deed of trust and mortgage, excepting such final decrees upon said claims and debts or any or either of them as may have then been superseded by proper appeal and supersedeas bond, and upon such payment by such purchaser or purchasers the said purchaser or purchasers shall be let into
92 the possession, use, and enjoyment of the said railroad and property purchased at said sale, subject to the conditions and stipulations hereinafter set forth and provided.

13th. Upon confirmation of sale made under this decree, and upon payment within twenty days thereafter of such part of the purchase-money as may be required to fully comply with the provisions and requirements of the above 12th section of this decree, the masters shall make, execute, and deliver to such purchaser or purchasers a good and sufficient deed of conveyance, conveying to such purchaser or purchasers all and singular the railroad, property, rights, franchises, and effects covered and conveyed by said first deed of trust and mortgage by proper and apt description. The deed so executed and delivered by the masters shall contain an express stipulation reserving to the court full power and jurisdiction over said property, with full authority and power, upon default of the purchaser or purchasers in complying with each and every of the requirements of this decree respecting payment of the purchase-money, to retake possession of said railroad and property and forth-
93 with sell the same or any part thereof upon order of the court to that effect entered. Said deed shall contain the further stipulation that the purchaser or purchasers, his or their assigns, will forthwith yield possession of said railroad and property upon such order of the court entered upon such default of the purchaser or purchasers in the payment of purchase-money as by the order of court required. Upon the delivery of said deed by the masters to such purchaser or purchasers the receiver of this court and all persons acting by or under his authority shall deliver and surrender possession to said purchaser or purchasers, on the production of said masters' deed or other proper evidence of the execution and delivery thereof, all of said railroad and property in his or their possession and under his or their control, and shall also surrender and deliver up to such purchaser or purchasers all books of account and records and papers in any manner appertaining to the said Toledo, Delphos and Burlington Railroad Company and its successor, the Toledo, Cincinnati & St. Louis Railroad Company, or pertaining to any or either of the constituent companies entering into
94 the consolidations resulting in said Toledo, Delphos & Burlington Railroad Company and its successor, the said Toledo, Cincinnati & St. Louis Railroad Company, together with all choses

in action, claims, property, and effects of every nature in the possession and under the control of said receiver.

14th. The residue of the purchase-money not required to make the payments required by and provided for in the above twelfth section of this decree shall be paid by the purchaser or purchasers from time to time upon the amounts found and determined and finally adjudged and decreed by the court to be due and payable upon court and receiver's indebtedness and to be prior and superior to the lien of said first deed of trust and mortgage, said payments to be made by the purchaser or purchasers upon twenty days' notice by the masters, upon the order of the court to that effect entered requiring such payment, until the entire purchase-money is exhausted, if it requires the entire purchase-money to pay and discharge said court and receiver's indebtedness. If any surplus is left after full payment of the court and receiver's indebtedness, as hereinabove provided, the same shall be distributed *pro rata* upon the coupons and bonds of said first mortgage or deed of trust until the same are fully paid. If any surplus remains after such full payment of the defaulted coupons and bonds secured by said first mortgage or deed of trust, such surplus so remaining shall be distributed *pro rata* upon the income bonds and coupons. In making payment of any surplus of said purchase-money left after full payment of the court and receiver's indebtedness the purchaser or purchasers shall be allowed to pay said surplus in the bonds and coupons to which the same may be applicable, as hereinabove provided, each such coupon and bond being received by the masters for such sum as the holder thereof is entitled to receive under the distribution herein provided and according to the priorities herein adjudged. In making payment of any order and decree decreeing any specific sum to be due and payable upon any claim or debt adjudged and decreed due and payable as a part of the court and receiver's indebtedness against said property the purchaser or purchasers shall have the right to pay and discharge said decree by furnishing to the masters the evidence that such purchaser or purchasers is the owner of the claim or debt so decreed to be due and payable and has authority to enter the same satisfied and discharged; and, to the end that all just claims against said property may be speedily determined and adjudged, it is now ordered by the court that all persons, firms, and corporations having or asserting any claim or claims against said property accrued while said property has remained in the possession of the court whose claim or claims have not already been filed and presented shall, within sixty days from and after the date of this decree, file and present to the circuit court of the United States for the district of Indiana such claim or claims, showing upon the face thereof when, where, and for what such claim or claims accrued; and the masters in publishing the advertisement and notice of sale of said property, as hereinbefore required, shall in such notice make due and proper mention of this order, which shall be all the notice thereof required to be given, and all persons, firms, and corporations not having presented and filed their claims within said sixty days, as herein provided,

shall be, and they are hereby, forever barred and foreclosed.
97 This order shall not apply to operatives and employees rendering or having rendered services to the receiver appointed by this court whose names and services appear upon the pay-rolls of said receiver.

15th. The distribution of the proceeds of the sale of the said railroad and property under this decree shall be as follows:

1. To court costs, masters' fees, solicitors' fees, and counsel fees as the same may hereafter be determined and adjudged by the court and the court and receiver's indebtedness.

2. *Pro rata* distribution upon the coupons and bonds secured by the said first deed of trust and mortgage by this decree foreclosed.

3. *Pro rata* distribution upon the income bonds and coupons hereinbefore mentioned.

16th. The complainants herein and the purchaser or purchasers at the foreclosure sale under this decree reserve the right to appeal from any orders and final decrees made by the court directing and decreeing the payment of claims and debts found and determined and adjudged and decreed to be due and payable as court and
98 receiver's indebtedness and to be prior and superior in equity to the lien of said first deed of trust and mortgage herein and hereby foreclosed, if they shall be so advised.

17th. It is further ordered by the court that the clerk of this court do forthwith deliver to the United States circuit court for the northern district of Ohio, western division, a certified copy of this decree.

W. Q. GRESHAM.

And it is further ordered that any or either of the parties to this cause may apply to the court for such other and further directions at the foot of this decree as may be necessary to carry it into effect, according to its true intent and meaning.

It is hereby stipulated that the testimony heretofore taken and filed in this cause, under the reference to A. J. Ricks, special master, may be used in any future litigation touching Toledo terminal property with the same effect as though originally taken therein, each party to such future litigation reserving the right to take additional testimony if so advised; and the purchaser at foreclosure sale shall take, subject to this provision, and shall be deemed to have assented thereto.

99 And afterwards, to wit, at the November term of said court, on the 30th day of December, 1885, before Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now William P. Fishback and John McNulta, the special masters appointed herein and charged with the duty of making the sale, and file their report of sale herein in the words following, to wit:

100 To the honorable court:

The undersigned, Wm. P. Fishback and John McNulta, the special masters appointed herein and charged with the duty of making the sale herein, according to the direction of the several orders and decrees made in the above-entitled cause in the circuit court of the United States for the district of Indiana and the northern district of Ohio, western division, respectfully report to the court as follows:

Pursuant to said orders and decrees, notice of the time, place, and terms of sale was given by publication of said notice as follows:

In the Daily New York Evening Post, a daily newspaper of general circulation printed and published in the city of New York, State of New York, on the days following, viz: Nov. 28th, Dec. 5th, 12th, 19th, and 26th, A. D. 1885.

In the Daily Springfield, Illinois Journal, a daily news-
101 paper of general circulation printed and published in the city of Springfield, State of Illinois, on the days following, viz: Nov. 28th, Dec. 5th, 12th, 19th, and 26th, A. D. 1885.

In the Daily Indianapolis Journal, a daily newspaper of general circulation printed and published in the city of Indianapolis, State of Indiana, on the days following, viz: Nov. 28th, Dec. 5th, 12th, 19th, and 26th, A. D. 1885.

In the Daily Boston Journal, a daily newspaper of general circulation printed and published in the city of Boston, State of Massachusetts, on the days following, viz: Nov. 28th, Dec. 5th, 12th, 19th, and 26th, A. D. 1885.

In the Daily Toledo Blade, a daily newspaper of general circulation printed and published in the city of Toledo, State of Ohio, on the days following, viz: Nov. 28th, Dec. 5th, 12th, 19th, and 26th, A. D. 1885.

The publication of this said notice in each and all of said
102 newspapers began at least thirty days prior to the time of sale, and said notice was to the effect that said sale would take place at the door of the United States circuit court room on Wednesday, the 30th day of December, A. D. 1885, at 12 o'clock m. of said day.

Copies of said notice as published in said newspapers, accompanied by affidavit showing the publication thereof, are filed herewith and made part of this report.

After having given said notice in the manner aforesaid and pursuant thereto, and in obedience to the several decrees and orders of said courts in that behalf, the undersigned, special masters, attended in person at the said city of Indianapolis, county of Marion, State of Indiana, and at the door of the United States circuit court room for the district of Indiana, upon the day appointed and at the hour
103 named in said notice of sale, and, in the presence of a number of persons attending said sale and having the opportunity to bid thereat, did then and there at public outcry openly offer and expose to sale, upon the terms and provisions of said decrees and or-

ders of said courts and said notice of sale, as an entirety all and singular the entire railroad of the Toledo, Delphos and Burlington Railroad Company and the Toledo, Cincinnati and St. Louis Railroad Company, extending from the city of Kokomo, in the State of Indiana, to the city of Toledo, in the State of Ohio, with all its franchises, rights, and privileges as described in the printed paper which was read by the special masters at the time and in the hearing of the persons so assembled, to wit:

Masters' Sale of the Toledo, Cincinnati & St. Louis Railroad from Toledo, Ohio, to Kokomo, Indiana, Commonly Known as the Toledo Division.

104 In obedience to an order of sale issued out of the circuit court of the United States for the district of Indiana upon a decree rendered in a cause wherein The Central Trust Company of New York, James M. Quigley, Charles T. Harbeck, and John McNab were complainants and The Toledo, Delphos & Burlington Railroad Company of Ohio and Indiana and The Toledo, Cincinnati & St. Louis Railroad Company of Ohio, Indiana, and Illinois and others were defendants, and a like decree rendered by the circuit court of the United States for the northern district of Ohio, western division, in an ancillary cause wherein the same complainants were complainants and the same defendants were defendants, in each of which a decree of foreclosure has been entered in said courts upon certain mortgages and trust deeds executed by the Toledo, Delphos & Burlington Railroad Company to the Central Trust Company of New York on the 17th day of January, 1880, the
105 undersigned, special masters appointed by the said courts, will offer for sale, at public auction, to the highest bidder, at the door of the United States circuit court room, in the city of Indianapolis, in the county of Marion and State of Indiana, on Wednesday, the 30th day of December, A. D. 1885, at 12 o'clock noon of said day, all the following-described property, namely:

All and singular the line of railroad of the said Toledo, Delphos & Burlington Railroad Company between Toledo, Lucas county, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen, and Van Wert, in the State of Ohio, and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant, and Howard, in the State of Indiana, to the city of Kokomo, Indiana, being about one hundred and eighty miles in length, together with all and singular the rights of way, road-bed, and track between the terminal points aforesaid, together with all the stations, depot grounds,
106 rails, fences, bridges, sidings, engine-houses, machine shops, buildings, and erections in any way appertaining unto said railroad, together with all engines, cars, machinery, supplies, tools, and fixtures held, owned, or acquired by the said railroad company for use in connection with its line of railroad aforesaid, and all depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other terminal facilities owned by said railroad company, together with all and singular the powers and franchises belonging

thereto, and the tolls, incomes, and revenue to be levied by and derived therefrom, being all and singular the railway property covered and conveyed by certain mortgages and deeds of trust executed and delivered by the Toledo, Delphos & Burlington Railroad Company on the 17th day of January, A. D. 1880, to the Central Trust Company of New York to secure certain bonds and interest warrants or coupons described in said deeds of trust and mort-
107 gages, including the rights of way thereof, the road-bed thereof, the superstructures of all sorts thereon, its water and other stations and shops, the lands and grounds connected therewith, and tools or implements owned or provided to be used thereon and therein and in constructing and repairs to cars and machinery of said road or the track and the superstructures aforesaid, and all fixtures and superstructures of whatever name or nature, and the lands and grounds connected therewith used or provided to be used in operating said road, wherever situated, including all terminal facilities owned by the said Toledo, Delphos & Burlington Railroad Company at the date of the execution of the said trust deeds and mortgages to said Central Trust Company of New York or thereafter owned by the said Toledo, Delphos and Burlington Railroad Company and by its successor by consolidation, the Toledo, Cincinnati & St. Louis Railroad Company, and provided to be used in the operation of said
108 railroad, and all cars, engines, and rolling stock belonging to the said Toledo, Delphos & Burlington Railroad Company and the Toledo, Cincinnati & St. Louis Railroad Company or either of them, and all supplies and other things provided by the said railroad companies last named or either of them or by the receivers appointed by the order of this court to be used in operating said railroad, together with all corporate franchises of said railroad companies last named and of each and every of the original constituent companies entering into the various consolidations forming the said Toledo, Delphos & Burlington Railroad Company and its successor, the said Toledo, Cincinnati & St. Louis Railroad Company, including the rights and franchises of said several companies.

All of said railroad property, with its appurtenances, to be sold as an entirety without appraisement and without reference and
109 not subject to the law or laws of the States of Indiana, Illinois, and Ohio touching rights of redemption from mortgage sales.

Any person desiring to bid at such sale will be required to make a deposit of thirty-five thousand dollars ($35,000) with the undersigned before any bid will be received, which deposit shall be absolutely forfeited to the use of the trusts in the hands of the Central Trust Company of New York under said trust deeds and mortgages if the bidder to whom the property shall be struck off shall fail to pay or complete the said purchase in accordance with the terms of said sale and the orders and decrees of the said United States circuit court for the district of Indiana.

The undersigned will not receive or cry any bid for a sum less than six hundred thousand dollars ($600,000).

Within twenty days after the confirmation of such sale the pur-

chaser or purchasers shall pay of the unpaid purchase-money for which said property is sold a sum sufficient, taken together
110 with the said thirty-five thousand dollars ($35,000) paid at the time of such sale, to pay and discharge the court costs, the masters' fees, solicitors' fees, counsel fees, and the claims and debts, including taxes legally due upon said property, that shall have been then and prior thereto found and determined and finally adjudged and decreed to be due and payable as court and receiver's indebtedness and to be prior and superior in equity to the lien of the said deeds of trust and mortgages, excepting such final decrees upon said claims and debts or any or either of them as may then have been superseded by proper appeal and supersedeas bond; and upon such payment by such purchaser or purchasers the said purchaser or purchasers shall be let into the possession, use, and enjoyment of said railroad and property purchased at said sale, subject to the conditions following, viz:

111 After the confirmation of said sale and payments as above provided a deed of conveyance will be made to the purchaser or purchasers, conveying the railroad property purchased at such sale, which deed shall contain a stipulation reserving to the said circuit court of the United States for the district of Indiana full power and jurisdiction over said property, with full authority and power, upon default of the purchaser or purchasers in complying with each and every of the requirements of the said decree respecting payment of the purchase-money, to retake possession of said railroad and property and forthwith sell the same or any part thereof upon order of the said court to that effect entered.

Said deed will contain the further stipulation that the purchaser or purchasers, his or their assigns, will forthwith yield pos-
112 session of said railroad and property upon such order of the court entered upon such default of the purchaser or purchasers in the payment of purchase-money, as by the order of the court required.

The residue of the purchase-money not required to make the payments provided for above shall be paid by the purchaser or purchasers from time to time upon the amounts found and determined and finally adjudged and decreed by the court to be due and payable upon court and receivers' indebtedness and to be prior and superior to the lien of said first deed of trust and mortgage executed Jan. 17, A. D. 1880; said payment to be made by the purchaser or purchasers upon twenty days' notice by the master, upon the order of the court to that effect entered, requiring such payment, until the entire purchase-money is exhausted, if it requires the entire purchase-money to pay and discharge said court and receivers'
113 indebtedness. If any surplus is left after full payment of the court and receivers' indebtedness, as hereinbefore provided, the same shall be distributed *pro rata* upon the coupons and bonds of said first mortgage or deed of trust until the same are fully paid. If any surplus remains after such full payment of the defaulted coupons and bonds secured by said first mortgage or deed of trust, such surplus so remaining shall be distributed *pro rata* upon

the income bonds and coupons. In making payment of any surplus of said purchase-money left after full payment of the court and receivers' indebtedness the purchaser or purchasers shall be allowed to pay said surplus in the bonds and coupons to which the same may be applicable, as hereinbefore provided, each such coupon and bond being received by the masters for such sum
114 as the holder thereof is entitled to receive under the distribution herein provided and according to the priorities adjudged by said court. In making payment of any order and decree decreeing any specific sum to be due and payable upon any claim or debt adjudged and decreed due and payable as a part of the court and receivers' indebtedness against said property, the purchaser or purchasers shall have the right to pay and discharge said decree by furnishing to the master the evidence that such purchaser or purchasers are the owners of the claim or debt so decreed to be due and payable and has authority to enter the same satisfied and discharged.

And to the end that all just claims against said property may be speedily determined and adjudged, notice is hereby given that all persons, firms, and corporations having or asserting any claim or claims against said property, accrued while said property has remained in the possession of the court, whose
115 claim or claims have not already been filed or presented, shall, within sixty days from and after the 12th day of November, A. D. 1885, file and present to the circuit court of the United States for the district of Indiana such claim or claims, showing upon the face thereof when, where, and for what such claims accrued; and all persons, firms, and corporations not having presented and filed their claims within said sixty days shall be forever barred and foreclosed:

Provided that operatives and employés having claims for services rendered to the receivers appointed by this court, whose names and services appear upon the pay-rolls of said receivers, shall not
116 be required to present their claims under this notice.

W. P. FISHBACK,
JOHN McNULTA,
Special Masters.

BUTLER, STILLMAN & HUBBARD,
HOADLY, JOHNSON & COLSTON,
BAKER, HORD & HENDRICKS,
McDONALD, BUTLER & MASON, *Solicitors.*

And thereupon Sylvester H. Kneeland did bid for said property the sum of six hundred thousand dollars ($600,000).

Before said bid was considered or received said bidders placed on deposit with said special masters the sum of thirty-five thousand dollars in cash as a pledge that the bid so made would be made good in case of acceptance, which sum was then and there paid into
117 court by delivering the same to Noble C. Butler, Esq., clerk of the United States circuit court for the district of Indiana.

And no one bidding more and that being the highest and best

bid, and more than the minimum price fixed by the orders of said court for the sale of said property, it was thereupon then and there, at the hour of twelve o'clock and 30 minutes of said day, openly and publicly struck off and sold to the said Sylvester H. Kneeland for the sum of six hundred thousand dollars.

And said special masters submit their doings herein for the consideration and further order of the court.

December 30th, 1885.

Respectfully submitted.

WILLIAM P. FISHBACK,
JOHN McNULTA,
Special Masters.

118 And afterwards, to wit, at the November term of said court, on the 5th day of February, 1886, before the Honorable Walter Q. Gresham and the Honorable William A. Woods, judges as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by their solicitors, and the purchaser of said railroad and property, by his solicitor, and show to the court that heretofore, to wit, on November 12th, 1885, final decree of foreclosure and sale was rendered and entered by this court in this cause; that by said decree William P. Fishback and John McNulta were appointed special masters to sell said railroad and property in accordance with the terms, conditions, and notices prescribed and provided in said decree; that afterwards, to wit, on the 30th day of December, A. D. 1885, the said masters, William P. Fishback and John McNulta, did sell said railroad and property in obedience to and performance of the directions and conditions of the said decree, and filed in this court their written report of such sale and their proceedings as such special masters under said decree; which said report is on file and of record in this cause in this court, to which reference is hereby made, and that more than thirty days have elapsed since the filing of said report of sale, and no exceptions have been filed thereto in said cause.

And thereupon, upon motion, it is ordered, adjudged, and decreed by the court that the said sale of said railroad and property in said decree, notice of sale, and report of said sale mentioned and described be, and the same is hereby, in all things approved and confirmed by the court.

It is further ordered, adjudged, and decreed that upon the performance by the purchaser at said sale of the terms and con-
119 ditions in that behalf in said decree provided he shall be entitled to have and receive a good and sufficient deed of conveyance conveying to him said railroad and property by the exact description in said final decree and notice of sale contained and set forth:

And it is further ordered, adjudged, and decreed that the Central Trust Company of New York and the Toledo, Cincinnati and St. Louis Railroad Company be, and they are hereby, required to join in the conveyance of said railroad and property whenever the said deed

shall be ordered, executed, and delivered by the further order of this court; and this cause is continued for further proceedings in accordance with the terms and stipulations of said final decree.

120 And afterwards, to wit, at the November, 1885, term of said court, on the 10th day of March, 1886, before Honorable William A. Woods, one of the judges of said court, the following further proceedings in the above-entitled causes were had, to wit:

Now, on this day, come the special masters, William P. Fishback and John McNulta, appointed herein, and present to the court a certain deed, a copy of which is hereto annexed (and the same shall be spread of record in connection with this order and decree), made by them in accordance with the decree entered in the above-entitled cause, in and by which they, the said masters, convey all the property and franchises which were of the Toledo, Delphos and Burlington Railroad Company and of the St. Louis Division of the Toledo; Cincinnati and St. Louis Railroad Company to Sylvester H. Kneeland, the purchaser thereof, and ask that the said deed be by the court affirmed.

And the court, being fully advised in the premises, does hereby confirm the said deed and the acts of the said masters in that behalf, and the said masters are hereby ordered to deliver the said deed to the said Sylvester H. Kneeland.

And it is further ordered that said deed is confirmed and delivered with the express understanding that the court shall have and retain full power and authority to retake possession of said property or any part thereof if the said grantee shall fail to pay the full purchase-money according to the terms of the decrees of sale; and that in case any appeal is taken from any decree for the payment of money by said grantee and supersedeas bond be given, the amount secured by such bond shall be considered as a part of the purchase-money, to enforce the payment of which the court may retake said property or any part thereof.

121 It is further ordered that the Central Trust Company of New York and the Toledo, Cincinnati and St. Louis Railroad Company of Ohio, Indiana, and Illinois, parties hereto, make, execute, and deliver to said Sylvester H. Kneeland a deed to all of said property and franchises embraced in the mortgages foreclosed in the above causes, in accordance with the decrees heretofore made in that behalf.

And it is further ordered that the said John McNulta, receiver herein, deliver immediate possession to said Sylvester H. Kneeland or to his agent, James M. Quigley, of all of the said property mentioned in the said deed, and that the said receiver without delay proceed to pay the supply and labor claims now due under his administration and turn over to the clerk of this court any money that may be in his hands, together with the certificate of stock of the Frankfort and State Line Railroad Company, amounting to the sum of $1,800,000, par value; and, further, that he make, as soon as practicable, his final report as such receiver; and that, subject to the further order of this court, the said receiver turn over to the clerk of the U. S. court at Toledo, Ohio, all books, papers, and vouchers that

may be in his possession or control relating in any way to the receivership herein, including those received from his predecessor.

It is further ordered that the clerk of this court do forthwith send to the clerks of the circuit courts of the United States for the northern district of Ohio, western division, and the southern district of Illinois certified copies of this order and decree with copies of deed attached.

Masters' Deed.

Toledo, Cincinnati & St. Louis R. R., William P. Fishback and John McNulta, special masters,
to
Sylvester H. Kneeland.

122 This deed of conveyance, made this tenth day of March, A. D. 1886, by William P. Fishback and John McNulta, special masters of the circuit court of the United States for the district of Indiana, the southern district of Illinois, and the northern district of Ohio, western division, grantors, to Sylvester H. Kneeland, grantee, witnesseth:

That heretofore, in June, 1884, there were filed in the circuit court of the United States for the district of Indiana and the southern district of Illinois respectively bills of complaint in chancery, wherein The Central Trust Company of New York, Edward F. Leonard, James M. Quigley, and others were complainants and The Toledo, Cincinnati and St. Louis Railroad Company of Ohio, Indiana, and Illinois and others were defendants, and that heretofore, in October, 1883, there were filed in the circuit court- of the United States for the district of Indiana and the northern district of Ohio, western division, bills of complaint in chancery, wherein The Central Trust Company of New York, James M. Quigley, and others were plaintiffs and The Toledo, Delphos & Burlington Railroad Company, The Toledo, Cincinnati & St. Louis Railroad Company, and others were defendants, the object and prayer of which said bills of complaint so filed in the United States circuit court- for the district of Indiana and the southern district of Illinois was the foreclosure of certain mortgages and trust deeds executed by the said Toledo, Cincinnati and St. Louis Railroad Company to the Central Trust Company of New York and Thomas A. Hendricks, trustees, and the object and prayer of which said bills of complaint so filed in the circuit court- of the United States for the district of Indiana and the northern district of Ohio,
123 western division, was the foreclosure of certain mortgages and trust deeds executed by the said The Toledo, Delphos and Burlington Railroad Company to the Central Trust Company of New York, trustee.

Whereas such proceedings were had in said causes that afterwards, on the 12th day of November, 1885, said causes so pending in the circuit court of the United States for the district of Indiana coming on to be heard, having been set down for hearing on the bills of complaint filed in said causes and the several answers thereto and other pleadings filed in said causes and the exhibits and testi-

mony, upon which the court, being fully advised, did find the equity of the causes in favor of said complainants named in the bills of complaint mentioned, and, among other things, did then and there order, adjudge, and decree that the premises, real and personal, property, rights, and franchises named in said decree, to wit:

All and singular the line of railroad between a connection with the Toledo, Delphos and Burlington railroad in the city of Kokomo, Howard county, in the State of Indiana, and extending thence through the counties of Howard, Clinton, Tippecanoe, Montgomery, Fountain, Parke, and Vermillion, in the State of Indiana, and Vermillion, Edgar, Douglas, Coles, Cumberland, Shelby, Fayette, Bond, Madison, Montgomery, and St. Clair, in the State of Illinois, to the city of East St. Louis, in St. Clair county, Illinois, being about two hundred and seventy miles in length, together with all and singular the rights of way, road-bed, and track laid between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, and erections in any way appertaining unto said line of described railroad between said points, together with all machinery,
124 supplies, tools, and fixtures owned by the said Toledo, Cincinnati and St. Louis Railroad Company for use in connection with the line of railroad aforesaid between said points, and all the depot grounds, yards, sidings, turnouts, sheds, machine shops, and leasehold rights in connection with said line of railroad between said points, together with all and singular the powers and franchises thereto belonging, and the tolls, income, and revenue to be received or derived therefrom, being the property described in the mortgage and trust deeds executed by the Toledo, Cincinnati and St. Louis Railroad Company to the Central Trust Company of New York and Thomas A. Hendricks, trustees, and commonly known as the St. Louis Division of the Toledo, Cincinnati and St. Louis railroad, and also the following property, viz:

All and singular the line of railroad of the said Toledo, Delphos and Burlington railroad from Toledo, Lucas county, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen, and Van Wert, in the State of Ohio, and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant and Howard, in the State of Indiana, to the city of Kokomo, Indiana, being about one hundred and eighty miles in length, together with all and singular the right of way, road-bed, and track between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, buildings, machine shops, and erections in any way appertaining unto said railroad, together with all engines, cars, machinery, supplies, tools, and fixtures held, owned, or acquired by the said railroad company for use in connection with the line of railroad aforesaid, and all depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other ter-
125 minal facilities owned by said railroad company, together with all and singular the powers and franchises belonging thereto, and the tolls, income, and revenue to be levied by and derived therefrom, being all and singular the railway property covered and con-

veyed by certain mortgages and deeds of trust executed and delivered by the Toledo, Delphos and Burlington Railroad Company on the 17th day of January, A. D. 1880, to the Central Trust Company of New York to secure certain bonds and interest warrants or coupons described in said deeds of trust and mortgages, including the rights of way thereof, the road-bed thereof, the superstructures of all sorts thereon, its water and other stations and shops, the lands and grounds connected therewith, the tools or equipments owned or provided to be used thereon and therein and in constructing and repairs to cars and machinery of said road or the track and the superstructures aforesaid, and all fixtures and superstructures of whatever name or nature, and the lands and grounds connected therewith used or provided to be used in operating said road, wherever situated, including all terminal facilities owned by the said Toledo, Delphos and Burlington Railroad Company at the date of the execution of the said trust deeds and mortgages to said Central Trust Company of New York or thereafter owned or acquired by said Toledo, Delphos and Burlington Railroad Company or by its successor by consolidation, the Toledo, Cincinnati and St. Louis Railroad Company, and provided to be used in the operation of said railroad, and all cars, engines, and rolling stock belonging to said Toledo, Delphos and Burlington Railroad Company or the Toledo, Cincinnati and St. Louis Railroad Company or either of them, and all supplies and other things provided by the said railroad companies last named or either
126 of them or by the receivers appointed by the order of this court to be used in operating said railroad, together with all corporate franchises of saod railroad companies last named and each and every of the original constituent companies entering into the various consolidations forming the said Toledo, Delphos and Burlington Railroad Company and its successor, the said Toledo, Cincinnati and St. Louis Railroad Company, including the rights and franchises of said several companies, being the property and premises described in the mortgages and deeds of trust executed by the said Toledo, Delphos and Burlington Railroad Company to the Central Trust Company of New York, trustee, including the property thereafter acquired, in accordance with the terms of said mortgages and trust deeds, and being commonly known as the Toledo Division of the Toledo, Cincinnati and St. Louis railroad, should be sold at public auction as an entirety by the special masters above named at the door of the United States circuit court room, in the city of Indianapolis, Marion county, Indiana;

And whereas said decree did further provide that before making said sale of the premises and property hereinbefore first above described, namely, the property covered by the mortgages and deeds of trust to the Central Trust Company of New York and Thomas A. Hendricks, trustee-, commonly known as the St. Louis Division of the Toledo, Cincinnati and St. Louis railroad, said special masters should give previous notice of the time, place, and terms thereof by advertisement in one newspaper published in the city of New York, State of New York; one in the city of Boston, Massachusetts; one in

the city of Indianapolis, Indiana, and one in the city of
127 Springfield, Illinois, once each week for four consecutive weeks,
the first of which publications was to be not less than thirty days before the day of sale, which decree further provides that said property should be sold at public auction to the highest bidder as an entirety, without relief from valuation or appraisement laws and free from all right of redemption, for the sum of not less than nine hundred thousand dollars;

And whereas by the decree in said cause wherein The Central Trust Company of New York and others were complainants and The Toledo, Delphos and Burlington Railroad Company of Ohio and Indiana and The Toledo, Cincinnati and St. Louis Railroad Company of Ohio, Indiana, and Illinois and others were defendants it was ordered, adjudged, and decreed that the railroad premises and property herein described covered by the mortgages and trust deeds executed by the Toledo, Delphos and Burlington Railroad Company to the Central Trust Company of New York, being known as the Toledo Division of said Toledo, Cincinnati & St. Louis railroad, should be sold at public auction as an entirety by said special masters without appraisement, without reference, and not subject to the law or laws of the States of Indiana, Illinois, and Ohio touching rights of redemption from mortgage sales; which said decree further provided that the said special masters before offering said property, franchises, and premises for sale should advertise the time, place, and terms of such sale, together with a general description of such property, in one newspaper published in the city of New York, in the State of New York; one published in the city of Boston, Massachusetts; one published in the city of Toledo, in the State of Ohio; one published in the city of Indianapolis, in the State of Indiana,
and one published in the city of Springfield, in the State
128 of Illinois, once each week for four consecutive weeks, the first insertion of which advertisement and notice was to be not less than thirty days before the day of sale;

And whereas it appeared to said court that concurrent proceedings for the foreclosure of said mortgages and trust deeds executed by the said Toledo, Cincinnati and St. Louis Railroad Company to the Central Trust Company of New York and Thomas A. Hendricks, trustees, were pending in the southern district of Illinois, and that like concurrent proceedings for the foreclosure of said mortgages and trust deeds executed by the Toledo, Delphos and Burlington Railroad Company to the Central Trust Company of New York, trustee, were pending in the circuit court of the United States for the northern district of Ohio, western division, in which said proceedings respectively ancillary or concurrent decrees had been entered confirming the appointment of said William P. Fishback and John McNulta special masters to make said sales in accordance with the terms of the decrees so entered in said causes in the circuit court of the United States for the district of Indiana;

And whereas afterwards, in conformity with the said several decrees, upon the precipes of the solicitors for the said Central Trust Company of New York and Thomas A. Hendricks, trustees, as pro-

vided in each of said decrees, certified copies of said decrees and orders of sale did issue under the seals of said courts respectively and directed to the said special masters, as by said decrees required, commanding the execution of the decrees aforesaid, under which orders of sale said special masters gave notice by publication, as required by said decrees, that they would on Wednesday, December 30th, 1885, at the door of the United States circuit court room,
129 in the city of Indianapolis, Marion county, Indiana, at 12 o'clock noon of said day, offer for sale at public auction to the highest bidder conforming to the conditions of said decree the premises, real and personal property, rights, and franchises so ordered to be sold according to the directions and terms and subject to the conditions prescribed by said decree;

And whereas on said day, at said time, in pursuance of said notices given by said publications as required by said decrees, said special masters offered said premises and real and personal property, rights, and franchises for sale at public auction to the highest bidder as aforesaid, and thereupon Sylvester H. Kneeland, having complied with and conformed to all the conditions, provisions, and requirements of said decrees for the sale of the property hereinbefore described and designated as the Toledo Division of said Toledo, Cincinnati and St. Louis Railroad Company, did offer and bid the sum of six hundred thousand dollars, the same being the minimum sum required by said decree, and, he being the highest and best bidder therefor and no person offering to bid any larger sum, the said special masters thereupon struck off and sold the same to the said Sylvester H. Kneeland;

And whereas on the same day, at the same time, in pursuance of said notice given by said publication as required by said decree, the said special masters offered said premises and all real and personal property, rights, and franchises for sale at public auction to the highest bidder as aforesaid, namely, the railroad property hereinbefore described and designated as the St. Louis Division of said Toledo, Cincinnati and St. Louis railroad, and thereupon the said Sylvester H. Kneeland, having complied with and conformed
130 to all the conditions, provisions, and requirements of said decree to enable him to bid for the same, did offer and bid for said property the sum of nine hundred and one thousand dollars, the same being more than the minimum sum required by said decree, and, he being the highest and best bidder therefor, the said special masters thereupon struck off and sold the same to the said Sylvester H. Kneeland;

And thereupon said special masters filed their report of sale of said Toledo Division in the said circuit court of the United States for the district of Indiana and the circuit court of the United States for the northern district of Ohio, western division, respectively, and did also file their report of said sale of said railroad property known as the St. Louis Division in said circuit court of the United States for the district of Indiana, all of which said reports of sale show that said notices had been duly given and said sales made as aforesaid; and by said reports it further appeared that said bidder, before

making said bids and in conformity with the terms of said decrees, had deposited with said special masters the sums of money to be deposited by the terms of said decrees;

And whereas afterwards, in the said circuit court of the United States for the district of Indiana, there were respectively entered decrees in said causes approving said reports therein respectively filed and confirming all the proceedings of said special masters in making said sales and confirming the sales of said premises, and thereupon the clerk of said circuit court of the United States for the district of Indiana sent certified copies of said decrees of confirmation to the clerk- of the United States circuit court- for the southern district of Illinois and the northern district of Ohio, western division, respectively;

131 And whereas afterwards it was ordered and decreed by the said circuit court of the United States for the district of Indiana that the said special masters should execute and deliver to said Sylvester H. Kneeland their deed of conveyance in proper form, to be approved by said circuit court of the United States for the district of Indiana, conveying to said Sylvester H. Kneeland in fee simple all and singular the said premises, real and personal property, rights, and franchises so sold to him as aforesaid;

And whereas said purchaser, Sylvester H. Kneeland, has complied with the terms of the orders of said court in that behalf by paying and securing the payment of the purchase-money and has in all respects complied with the terms of sale as set forth in said decrees and in said notices of publication, all of which will more fully and at large appear, reference being had to the records of the proceedings in said causes in said circuit courts of the United States for the district of Indiana, the southern district of Illinois, and the northern district of Ohio, western division, all of which records are referred to and made a part of this deed:

Now, therefore, in conformity with said decrees, we, William P. Fishback and John McNulta, special masters as aforesaid, do hereby bargain, sell, and convey unto the said Sylvester H. Kneeland and to his heirs and assigns forever all of the premises, real and personal property, rights, and franchises hereinbefore described as fully and completely as we may lawfully do under the authority aforesaid, free, clear, and discharged of all right, authority, and interest, claim, lien, and equity of redemption in or to the premises, real and personal property, rights, and franchises so sold and

132 hereby conveyed and every or any part thereof of each and every of the defendants to said suits respectively and of all the persons claiming or to claim under them or any of them.

It is hereby stipulated that the court shall have, and hereby does reserve, full power and jurisdiction, upon the default of the said Sylvester H. Kneeland to comply with any order of the court respecting payment of the purchase-money, to retake possession of said property and forthwith sell the same or any part thereof upon order of the court to that effect entered; and the said grantee further stipulates that he and his assigns will forthwith yield possession of said railroad and property upon such order of the court en-

tered on his default in the payment of the purchase-money or any part thereof, as required by said decrees; and, further, that all money becoming due on appeals to the Supreme Court shall be deemed to be purchase-money, notwithstanding said decrees may have been superseded pending such appeal.

In witness whereof we have set our hands and seals hereunto, and we do now deliver this deed of conveyance, this 10th day of March, one thousand eight hundred and eighty-six.

WILLIAM P. FISHBACK. [SEAL.]
JOHN McNULTA. [SEAL.]

STATE OF INDIANA, }
Marion County. }

Before me, the undersigned, a notary public within and for said Marion county and State of Indiana, personally came the above-named William P. Fishback and John McNulta and acknowledged the execution of the foregoing deed.

[SEAL.] Witness my hand and notarial seal this 10th day of March, A. D. 1886.

CHRIST. H. STEIN,
Notary Public.

133 And afterwards, to wit, at the November term of said court, on the 21st day of December, 1885, before the Honorable William A. Woods, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

It is now ordered by the court that all claims filed in the above-entitled cause after the 5th day of November, 1885, on which day A. J. Ricks, Esq., was appointed special master herein by order of this court, be, and the same are hereby, referred to said special master, A. J. Ricks, and are to be deemed and considered as falling under and being embraced in said order of reference to said A. J. Ricks, and any and all references heretofore made to any other master of any of said claims against said property filed since said 5th day of November, 1885, are hereby revoked.

This order is made to the end that the said special master, A. J. Ricks, may have full power to take and state the accounts of the receivership of said property from the beginning thereof to the end thereof, as contemplated by the order of his appointment, and to the end that there be no double references of claims filed since the appointment of said Ricks special master as aforesaid.

Any and all claims heretofore filed in these causes or either of them and referred to Jacob D. Cox, as special master, prior to said 5th day of November, 1885, are to remain as so referred to said Cox and are to be considered and reported upon by said master, Cox.

Any and all claims heretofore filed in this cause and referred to William P. Fishback, master, prior to said 5th day of Novem-
134 ber, 1885, shall be and remain as so referred to said Fishback and are to be considered and reported upon by said Fishback—

The true intent and meaning of the said original order of appointment of November 5th, 1885, together with this modification thereof,

being to give to said master, Ricks, full power and authority to take, investigate, and state the accounts of the receivership of said property from the beginning thereof, to wit, August 1st, 1883, down to the present time, and to take such testimony as may be by said master deemed necessary and consider and report his findings, together with the evidence upon the said accounts and the doings of the said receivership and upon any and all claims filed in said cause subsequent to the said 5th day of November, A. D. 1885.

And afterwards, to wit, at the November term of said court, on the 30th day of December, 1885, before the Honorable William A. Woods, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

It is hereby ordered that the orders or reference to A. J. Ricks heretofore entered in this cause be, and the same are hereby, modified in this, that all claims filed or that may be filed in the U. S. circuit court for the district of Indiana against the property of said railway or the fund arising from the sale thereof be, and the same are hereby, referred to W. P. Fishback, master of this court.

135 And afterwards, to wit, on the 8th day of January, 1886, John T. Newton and others filed in said court their claim herein in the words following, to wit:

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, Western Division, }

At a stated term of the circuit court of the United States within and for the western division of the northern district of Ohio, begun and held at the city of Toledo, in said district, on the first Tuesday in December, being the first day of said month, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and tenth—present, the Honorable Martin Welker, district judge—among the proceedings then and there had were the following, to wit:

SATURDAY, *Dec. 12th.*

THE CENTRAL TRUST COMPANY OF NEW YORK and Others
vs.
THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY and Others. } No. 382.

136 And the court, being now further called upon to determine the rights, claims, and liens of John T. Newton and Charles L. Luce, Martha Stebbins and George Stebbins, who were made defendants and have answered herein, finds as follows:

1. That there was upon the first day of this term of court due from The Toledo, Cincinnati and St. Louis Railroad Company, defendant herein, to said John T. Newton and Charles L. Luce, for and on account of the right of way purchase- by said Toledo, Cincinnati and St. Louis Railroad Company, as in the first paragraph of this an-

swer herein is set forth, the sum of eight thousand and twenty-eight $\frac{96}{100}$ dollars.

2. That there was on the first day of this term due from said Toledo, Cincinnati and St. Louis Railroad Company to the said Martha Stebbins and George Stebbins, her husband, for and on account of the right of way purchased from them by the said last-named railroad company, as set forth in the second paragraph of said answer, the sum of three thousand and nine hundred sixty-nine $\frac{87}{100}$ dollars.

3. That neither of said defendants herein conveyed to said Toledo, Cincinnati and St. Louis Railroad Company or to any
137 one for it, by any deed or deeds which have been delivered or become operative, any part of said right of way so sold, but said company purchased & holds the same under the contract set forth in paragraph 3 of said answer and attached to said answer, subject to the payment of said sums of purchase-money so due the defendants, as above found.

That the said sum of $8,028.96 so due said Newton and Luce is by reason of the premises a lien prior to the right or claim of any other person, company, or corporation upon the said right of way so sold by them, to wit, the right to use forever as a right of way for railroad track or tracks a certain strip or parcel of land situated in the city of Toledo, Lucas county, Ohio, being a strip 40 feet wide, twenty feet on each side of a center line, described as follows:

Beginning at station 18 x 03.6, at a point in the line dividing subdivision 2 and subdivision 1, lot 14, river tract 10, United States reserve, and 113 feet running from the south side of Broadway, measured on said dividing line, thence easterly on a 2° 30′ curve to station 20 x 25.4, to end of curve; thence
138 easterly in a straight line to station 20 x 87.5, being a point on the *bay* lot line of lot 15, river tract 10, deed, 203.6 feet northerly from the centre of the main track of the Wabash, St. Louis and Pacific railroad, measure- on said half lot line, said strip being 683.9 feet long and containing $\frac{628}{1000}$ acres, more or less; and if other ground shall be needed in the construction and maintenance of two tracks, then said railroad company to have the right to use forever additional ground lying southward of said strip of 40 feet, not exceeding ten feet in width, on which to construct an embankment for a track parallel to center line of said forty feet, and the centre line of said track to be not further than 12 feet from the centre line of said 40-feet strip, the right being reserved to said Newton and Luce and their heirs and assigns to construct and maintain ice runs, machinery, and other appliances on and across said described lands in such manner as not to interfere with the operation and business of said railroad company, its successors and assigns.

That the sum of $3,969.87 *is* due from said company to
139 said Martha and George Stebbins is a lien prior to any right or claim of any other person, company, or corporation upon the right of way so sold by them to said company, to wit, the right to use forever as a right of way for railroad track or tracks a certain strip or parcel of land situated in the city of Toledo, Lucas

county, Ohio, being a strip 40 feet wide, twenty feet on each side of a certain line described as follows: Beginning at station 24 x 87.5, at a point on the half lot line of lot 15, river tract 10, U. S. reserve, 203.6 feet nearly from the center of the main track of the Wabash, St. Louis and Pacific railroad, measured on said half lot line, thence easterly on a straight line to station 28 x 26.0, to a point on the east line of lot 15, said strip being 338.5 feet long and containing $\frac{311}{1000}$ acres, more or less; and if other grounds should be needed in the construction and maintenance of two tracks, then said railroad company, its successors and assigns, to have the right to use from additional ground lying southward of said strip of 40 feet, not exceeding
10 feet in width, upon which to construct and embankment
140 for a track parallel to the centre line of said 40 feet, and the centre line of said track to be not further than 12 feet from the centre line of said 40-feet strip, said Martha & George Stebbins reserving to themselves all riparian rights and the right to construct and maintain ice runs, machinery, and other appliances over and across said described lands in such manner as not to interfere with the operation and business of the railroad company, its successors or assigns.

4. And the court further finds that said above-described premises & right of way are part of the property of the Toledo, Cincinnati & St. Louis Railroad Company covered by the mortgage of the Toledo, Delphos and Burlington Railroad Company set forth in and for the purpose of foreclosing which the complainants' bill herein was filed, and which mortgage is a lien upon said premises & right of way, subject and second to the respective liens of said defendants, Newton and Luce and Martha Stebbins and George Stebbins, as above found, and that in equity and for the publication of the rights of all the parties all the property covered by said
141 mortgage will be sold as an entirety.

Wherefore it is considered and ordered by the court that the said John T. Newton and Charles L. Luce have and recover said sum of $8,028.96 so due to them, and said Martha Stebbins and George Stebbens have and recover said sum of $3,969.87 so due to them as liens upon all the proceeds of any sale of said mortgaged property that shall be made herein prior to the claims of said mortgage or any bonds or other claims secured thereby; and it is ordered that so much of said proceeds as may be necessary to pay said sums so above found due to said Newton & Luce and said Martha & George Stebbins and each of them, with the accruing interest and all costs of said defendants, shall be applied to such payment before paying any part of said mortgage debt, and said premises shall be in any order of court making distribution of the funds arising from any sale of said mortgage- property under foreclosure proceedings herein.

The clerk will enter this decree and order upon the journal in its proper place.

J. WELKER,
U. S. Judge.

142 UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Western Division, }

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that the within is a true copy of an order entered upon the journal of the proceedings of said court in the therein-entitled cause; that I have compared the same with the original entry of said order, and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said court, at Toledo, in said district, this 5th day of January, A. D. 1886, and in the — year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk,*
By HALLIE W. BROWN,
Deputy Clerk.

143 And afterwards, at the May term, 1886, on the 30th day of July, 1886, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in said cause were had, to wit:

Now comes A. J. Ricks, special master, and files 5th and 6th interlocutory reports herein in the words following, to wit:

To the honorables the judges of the circuit court of the United States for said district:

The undersigned, heretofore appointed a special master herein to enquire and report, among other things, "what of the claims, if any, filed at Indianapolis on account of receivers' indebtedness (other than that represented by pay-rolls and certificates) are obviously correct, giving the amounts due each claimant as the same appears on the receivers' books and accounts, stating what claims appear to be less or in excess of the correct amounts, what of such claims, if any, should be contested on the ground of fraud
144 in their inception, excess in amounts, or for any other reasons that may appear upon an examination of the receivers' and company's books and accounts at Toledo, also when the items making up said claims accrued," begs leave to submit his further interlocutory report as follows:

I attach hereto as Exhibit "A" to this report, and ask to make the same a part hereof, a list of the claims filed with the two receivers of the Toledo, Cincinnati and St. Louis Railroad Company, which are obviously correct as to the amounts claimed, except as noted. I have stated in the column for "remarks," opposite each claim, whatever discrepancies I have found as compared with the claims filed and with the receivers' books and vouchers. So much of these claims — are set up against Receiver W. J. Craig and as I have apportioned to the Northern Division of the road should not be contested for any of the reasons stated in the order of reference.

I have shown in separate columns the claims against the corporation and those against the Dwight receivership and the accounts

due to each claimant, as disclosed by the books and accounts
145 of said corporation and of said receiver, submitting the question as to how and by whom the same shall be paid to the court.

The claims of Newton and Luce for right of way are covered by decree of the circuit court of the United States for the northern district of Ohio for the amounts approved in "Exhibit A."

A further report will be made as soon as possible.

All of which is respectfully submitted.

A. J. RICKS,
Special Master.

EXHIBIT "A" to 5TH INTERLOCUTORY REPORT.

Name of claimant.	Amount of claim.	Date and remarks.	Due from Nor. Div.	Toledo.
Newton & Luce *et al.*..	8,028 96	Right of way, Toledo.....	8,028 96	8,028 96
	3,969 87	Decree of court for right of way.	3,969 87	3,969 87

146 And afterwards, at said May term, 1886, of said court, on the 31st day of August, 1886, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in said cause were had, to wit:

Comes now William P. Fishback, Esq., master in chancery, and files herein his report on claims covered by the 3d, 4th, and 5th reports of Special Master A. J. Ricks in the words following, to wit:

To the honorable court:

The undersigned, William P. Fishback, master in chancery, referring to the "third interlocutory report of A. J. Ricks, special master," filed July 8th, 1886, on claims against the receivership, respectfully reports to the court as follows:

Newton & Luce and Stebbens and others.

These claims are for right of way, based upon the decree made at Toledo. I report that the two amounts, $8,028.96, to Newton & Luce, and $3,969.87, to Martha & George Stebbins, should be paid by the Toledo Division.

This report covers only such of the claims mentioned in said reports of Special Master Ricks as accrued during the receiver-
147 ships of Receivers Dwight and Craig. I have reserved for future consideration and report so much of said claims as accrued prior to the appointment of a receiver. The amounts that I have given above, the payment of which is recommended, have been arrived at by an expert under directions of Mr. Ricks, the special master, and these reports are based upon what information is furnished by the books, accounts, and papers kept by the receiver in the office at Toledo.

An inspection of the claims will show that the following claims are allowed in full without contest by the report of Mr. Ricks, special master, the amounts being reported by him to be obviously correct from an inspection of the books and papers of the receivers at Toledo, Ohio:

Lene & Alden, $275; Poole Bros., $896.75; Shaw, Kendall & Co., $1,017.67; Charles A. Ball, $35; M. I. Wilcox, $265.44; The Wolf Coal and Mining Company, $5,436.06, shown by Ricks' fourth report.

A. H. Chaplain, $563.25; Crow, Hargadine & Co., $63.64; William Cashman, $8.00; Campbell & Young, $97.33; Richard A. Gunzburg, $15.20; David A. Jones, $26.50; Newton, Luce and others, $11,998.85; Thomas Robertson, $28.05, and the St.
148 Louis Transfer Company, $310.50, shown by Ricks' fifth report.

The claims last above named I return into court with this report.

The amounts reported as due to other claimants by Mr. Ricks do not correspond with the amounts claimed, and no further report can be made upon these discrepancies until the claimants have produced evidence in support of their claims, and as to these discrepancies between the amounts allowed and the amounts claimed no report is made.

Respectfully submitted.

WILLIAM P. FISHBACK, *Master.*

And afterwards, at said May term, on the 21st day of September, 1886, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in said cause were had, to wit:

Now comes Sylvester H. Kneeland, by McDonald, Butler and Mason, his solicitors, and files herein his exceptions to the report of William P. Fishback, master in chancery, filed August 31, 1886, which exceptions are in the words following, to wit:

149 Sylvester H. Kneeland, purchaser at foreclosure sale of the railroad and property, rights, and franchises involved in the above-entitled causes and trustee for the bondholders holding first-mortgage bonds secured by trust deeds upon said railroad and property so sold at foreclosure sale under decrees rendered in the above-entitled causes, and the bondholders' committee, co-complainant in the above-entitled causes, come now and except to the report of the master, William P. Fishback, filed herein August 31st, 1886, upon claims covered by the third, fourth, and fifth interlocutory reports of Special Master A. J. Ricks in this cause, filed herein, respectively, July 8th, 1886, July 15, 1886, and July 30th, 1886; and for said exceptions said exceptors say:

1. That by said report said master finds and reports that each and every of the claims mentioned and set forth in said report of Master Fishback and in said interlocutory report of Special Master Ricks is due and payable, whereas the said master should have found and reported that only a portion of said claims are due and payable

150 from the said lines of railroad sold under foreclosure decree in the above-entitled causes.

2. Said exceptors further except to said report of said master, Fishback, upon said interlocutory reports of said special master, Ricks, and say that by said report it is shown to this court that many of said claims therein reported are for supplies furnished during the time when the entire Toledo, Cincinnati & St. Louis railroad system, including each division thereof, *were* in possession of this court and being operated by the receivers of this court as a unit, and that some of said claims are for labor and material furnished during said period while said entire system *were* in operation by the said receivers of this court as a unit, and that other of said claims are for losses, overcharges, and fencing accruing during the time when said entire system was operated by the receivers of this court as a unit, and that as to all such claims for supplies and for labor and materials and for overcharges, losses, and fencing exceptors say that said master should have found and reported that on such a proportionate part thereof is due and payable from the

151 lines foreclosed and sold in the above-entitled causes as the business done on said lines bears to the entire business of the entire system during the said period during which the same was operated as a unit, and that the said master ought to have found and reported to the court an approximate proportion of said several claims so reported upon the scale and theory of apportionment heretofore adopted by this court in reference to car rentals accruing during the receivership and other like claims, whereas he has reported no such distribution, but simply reports the apportionment and distribution of the amounts owing to the several claimants among the respective divisions of the T., C. & St. L. railroad as reported by said master, Ricks; wherefore exceptors say that no payments can be required from the purchasers upon such claims or any or either of them until an order of apportionment thereto is duly rendered and entered in said causes by this court.

3. Said exceptors further except to said report of said

152 master, Fishback, upon said interlocutory reports of said special master, Ricks, for the reason that the said master, Fishback, found and reported that a large number of the claims so reported on should be wholly paid out of the property of and be apportioned to the lines foreclosed and sold in the above-entitled causes, and the said master, Fishback, has reported as to other of said claims that a large proportion thereof should be paid out of the property and be apportioned to said lines of railroad foreclosed and sold in the above-entitled causes, whereas the said master, Fishback, ought to have found and reported that none of said claims, or at least only a much smaller part thereof, ought to be paid out of and apportioned to said lines of railroad foreclosed and sold in the above-entitled causes, and that all of said claims, or at least a much larger proportion than that reported by the said master, should be paid out of and apportioned to the said Ohio divisions of said system.

4. Said exceptors further except to said report of said master,

Fishback, for the reason that by said report said master finds
153 to be due and payable a large number of claims, and same purporting to be allowed in full without contest, as to which the said master says: "The amounts being reported by said master, Ricks, being obviously correct from observation of the books and papers of the receivers at Toledo, Ohio;" that in and by said report of said master, Fishback, said claims were found to be due and payable, whereas the said master should have found and reported only a portion of said claims were due and payable from said lines of railroad sold under foreclosure decrees in the above-entitled causes; that said claims so reported as being obviously correct and being allowed in full without contest are for labor performed and supplies and material furnished during the period while said entire system was operated by the receivers of this court as a unit, and said exceptors say that as to all such claims, both for supplies and for labor and materials, said master should have found and reported that only such proportionate part is due and payable from the lines sold
154 and foreclosed in the above-entitled causes as the business done on said line bears to the entire business of the entire system during the said period during which the same was operated as a unit, and said master ought to have found and reported to the court an approximate apportionment of said several claims so reported upon upon the scale and theory of apportionment heretofore adopted by this court in reference to car rentals accruing during the receivership, and other like claims.

Wherefore exceptors pray the court that the said report of said master, Fishback, may be set aside and the matters therein reported may be re-referred to the master with directions to inquire and ascertain just what of said claims accrued while the entire system was in the possession of the courts by their receivers, and that said master be required to make a proper apportionment and distribution of said claims to the several parts of said system in accordance with the scheme and plan of *of* apportionment and distribution heretofore adopted by this court, or in accordance with such apportionment and distribution as may hereafter be ordered by the court in reference thereto; and exceptors will ever pray.

McDONALD, BUTLER & MASON,
Solicitors for Exceptors.

155 And afterwards, at the November term, 1886, on the 16th day of April, 1887, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges as aforesaid of said court, the following further proceedings in said cause were had, to wit:

This cause coming on to be further heard before the Hon. Walter Q. Gresham, judge of the seventh judicial circuit, Hon. Howell E. Jackson, judge of the sixth judicial circuit, and Hon. Martin Welker, district judge of the northern district of Ohio, sitting together, upon the various masters' reports and evidence and the exhibits filed therewith and the several exceptions filed thereto and upon questions reserved by the joint decree rendered October 1, 1886, and upon the application of the receiver, William J. Craig,

for additional compensation and evidence heard by the court upon said application—

The several parties in interest having been duly notified of said joint hearing and being present in person or by counsel, upon full argument the court, the said judges concurring, doth here now
156 finally order, adjudge, and decree as follows touching the several matters hereinafter in this decree mentioned and set forth, to wit:

1. It is ordered, adjudged, and decreed that all claims accrued during the six months prior to the receivership, known as six months' claims, of every character and description, however evidenced, be, and the same are hereby, rejected and disallowed, excepting only pay-rolls for the labor performed in the operation of the railroad during the six months next prior to the receivership, to wit, unpaid pay-rolls for labor performed in the operation of the railroad during the months of February, March, April, May, June, and July, A. D. 1883, which unpaid pay-rolls are to be paid out of the purchase-money funds arising from the sales of the several divisions of said railroad in the proportion and upon the percentages hereinafter in this decree set forth.

2. Interest on all claims allowed by the court and ordered to be paid out of the proceeds of sale of the several divisions of said railroad is disallowed, excepting only interest upon receivers' certificates, as provided in the body of said certificates.

157 3. All of the claims set forth in Exhibit "A" with report of Fishback and Ricks, special masters, filed March 10th, 1887, excepting only the following, to wit, claim of Curtis and Brainard for one hundred and eighty-four dollars, being claim No. 29 in said Exhibit "A," which is hereby rejected and disallowed, and excepting the claims of the Southeastern Division, the Dayton Division, the Cincinnati Division, and the Iron Mountain Division, which are hereinafter specifically rejected and disallowed, are hereby allowed as to the amounts accrued between August 1, 1883, and August 1, 1884, as in said report and exhibit set forth; and the purchasers of said several divisions are hereby ordered, directed, and decreed within thirty (30) day- from and after the entry of this decree to pay into the registry of the circuit court of the United States for the district of Indiana a sum of money sufficient to pay and discharge the proportional part of said entire indebtedness as set forth in said Exhibit "A" and payable as provided in clause one of this decree, excepting the claims hereinabove excepted and disallowed, payable by and charged against said several divisions upon the basis of
158 percentages as herein decreed and set forth, subject to credits as provided in the tenth clause of this decree.

The names of the claimants and the amount allowed to each claimant respectively is set forth in said Exhibit "A" and is herein and hereby allowed and decreed to be paid, being the following, namely:

List of claims accruing between August 1, 1883, and August 1, 1884, allowed by Masters Fishback and Ricks and approved by the court.

	Amos Bell & Co.	$141 20
	Atlantic & Pacific Railway Co.	126 41
	Bourn & Knowder M'f'g Co.	52 50
	Bohannan Wilson	83 20
	Blitz & Son, Israel	334 13
	Baugh Steam Forge Co.	1,184 16
	"Blade" Printing & Paper Co.	2,979 11
	Bostwick, Braun & Co.	2,379 76
	Baker, Dwight	251 54
	Butler & McCracken	368 49
	Baltimore Iron & Copper Works	1,014 73
	Bass Foundry & Machine Works	8,009 22
	Buck, M. M. & Co.	1,051 51
	Bradford, Moses	242 50
	Bain & Co., A. N.	310 67
	Canniff, J. J.	10 50
	Coit & Co.	312 85
	Cleveland Rubber Co.	140 00
	Cleaveland, Brown & Co.	2,910 44
159	Crera, Adams & Co.	2,024 73
	Camley & Co.	93 30
	Campbell & Young	97 33
	Cashman, William	8 00
	Crow, Hagardine & Co.	63 64
	Carry, C. C.	37 50
	Cincinnati Ice Co.	15 25
	Cleveland Co-operative Stove Co.	43 19
	Canada Railway Co.	10 64
	Chicago, St. Louis & P. R. R. Co.	148 07
	Cammeyer & Sayer	25 00
	Clark, B. S.	3 75
	Durnell, A. N.	105 30
	Diamond Street Car Spring Co.	216 04
	Delphos Light Bbl. Co.	25 00
	Dodd, Jefferson	50 00
	Dickson, Benjamin	65 00
	Dawes, Sam'l O.	500 00
	Dewey Stove Co.	30 40
	Ellis, Thos. G.	40 00
	Eureka Iron & Steel Works	909 32
	Emma Coal Co.	798 74
	Eaton & Co., Fred.	228 97
	French & Co., A.	285 84
	French, Hugh	2,577 65
	Fairbanks, Morse & Co.	36 30
	Ford, Johnson & Co.	32 85
	French Spiral Spring Co.	1,161 25

	F. & P. M. R. R. Co.	24 12
	Fisher, George	61 00
	Gaines, James	344 00
	Gunzburg, Richard A.	15 20
160	Galena Oil Works	4,178 55
	Gaskell & Co.	444 47
	Hall, John F.	176 22
	Hoopes & Townsend	1,159 41
	Hart Man'f'g Co.	30 00
	Haughton & Kneiser	6 40
	Hartwell Bros.	17 80
	Hassenzahl & Dandt	14 50
	Ind'p'l's & St. L. R'y Co.	740 66
	Johnson & Later	107 25
	Joyce, Cridland & Co.	123 05
	Jones, David J.	26 50
	Keyser, Chancey	150 00
	Ketcham, D.	15 90
	Lye & Zimmerloe	102 50
	Liflet, W. R.	89 00
	Lane & Alden	275 00
	Leon, B.	51 63
	Landam & Co.	17 00
	Lake Erie Iron Works	643 18
	McCullough, J. H.	92 00
	Matchell & R. L. Co.	8,816 16
	McGlare & Co., J. R.	17 35
	Same	5 00
	Murphy & Co.	403 37
	Moses Bros., N.	7,223 62
	McConway, Farley & Co.	14 88
	Mordan Frog & Crossing Co.	198 00
	Marvin, Ely & Co.	24 00
	Merchant & Co.	63 62
	March & Co., P. G.	556 59
	Murphy, Jno. A.	190 66
161	Morrow, W. B., adm'r of O. P. Gould	5,000 00
	McDermott, S. T.	16 00
	Michigan Central R'y	12 82
	Murphy Bros.	63 27
	McConnell, C. H.	36 35
	Newler, Alfred	25 00
	Norton, Ll. J.	25 00
	Nathan & Dryfus	1,993 20
	Nathan M'f'g Co.	94 20
	Norton, L. J.	12 00
	National R'y Publishing Co.	128 58
	North, Job	1,327 54
	Newton & Luce *et al.*	8,028 96
	Martha & George Stebbins	3,969 87
	N. Y., L. E. & W. R'y Co.	2 57

	Otis Iron & Steel Co.	517 54
	Outcault, Miller	80 00
	Plunket, Jonathan	167 55
	Pettibone & Mulliken	1,963 79
	Peckham, E. G.	15 55
	Pierson & Co.	8 80
	Plumbago Oil Co.	332 33
	Polk, R. T. & Co.	25 00
	Peter, William	617 76
	Pool Bros.	753 14
	Pierson, S. F.	17 50
	Pommer & Larsh	24 00
	Post & Co.	12,098 28
	Ross, Wm. F.	200 00
	Royce & Pulling	30 00
	Rouse, N. B.	116 00
	Roberts' Com. Co.	257 32
162	Reynolds Bros.	567 51
	Richards, C. M.	52 00
	R'y Speed Recorder Co.	653 10
	Smith, Oliver	41 00
	Scribner, C. H.	345 51
	St. Louis & San Francisco R'y Co.	19 95
	St. Louis Transfer Co.	310 50
	Shaw, Kendall & Co.	1,004 03
	Short & Forman	929 32
	Statlar, John	15 25
	St. Louis Bolt & Iron Co.	725 00
	Springfield I. Co.	618 07
	Snyder, C.	447 40
	Smith & Co., W. H. H.	2,716 19
	Simmons, H. & Co.	194 77
	Signal Oil Co.	4,745 40
	Shelley Bros.	20 00
	Scott, Judge A.	500 00
	Scott, Robert W.	750 00
	Taylor Bros.	80 00
	Thresher & Co.	353 74
	Tenn. Lum. Co.	306 64
	Toledo Bolt & Nut Co.	1,322 15
	Toledo Bee Co.	33 70
	Union Brass M'f'g Co.	578 83
	Walker, J. W.	105 00
	Waite, John A.	21 55
	Whitaker, Haynes & Co.	248 87
	Whitney & Tracey	10 94
	West & Traux	115 99
	Wade, M. S.	106 50
	Williamson, Geo. H.	61 00
	Westinghouse Air Brake Co.	813 10
163	White's Golden Lubricator Co.	3,653 92

Wood & Acklin, A.	62 40
Walker, J. W.	22 50
Wilcox, M. F.	265 44
Wolf Coal & Mining Co.	66 66
Ward, J. B.	27 30
York & Hilsabeck	23 95

To which order and decree decreeing the payment into court of a sum of money sufficient to pay the portion of said claims distributed to the lines purchased by him, purchaser Kneeland excepts for himself and other first-mortgage bondholders, his associates, and said Kneeland and his associates especially and specifically except to the ruling of the court requiring payment of the claims of Luce and Newton and Stebbins, as set forth in said Exhibit "A," filed March 10, 1887, with the report of Masters Ricks and Fishback.

And said Luce & Newton and Stebbins except to the disallowance of interest upon their claims.

And Post & Co. and W. B. Morrow, adm'r, also except to the disallowance of interest upon the order in their favor and pray an appeal, which the court allow, and fix the bond at one thousand ($1,000.00) dollars.

164 4. The claim presented in behalf of the Southeastern Division, the Cincinnati Division, and the Dayton Division for compensation for the transportation of coal over said divisions, and consumed in the ordinary operation of the entire system, is hereby rejected and disallowed, and the exceptions to the masters' reports allowing said claim are hereby sustained.

And said purchasers of said several divisions especially and specifically except to the ruling of the court in rejecting and disallowing said claim.

5. It is further decreed that in addition to the sum of $3,671.85, heretofore paid to the Brooks Locomotive Works by Receiver Dwight upon the five locomotives delivered to said receiver by said locomotive works, there be, and is hereby, allowed and decreed to be paid to said Brooks Locomotive Works in full payment for said five locomotives the further sum of thirty-three thousand eight hundred and twenty-eight and $\frac{15}{100}$ dollars ($33,828.15), said payment to be distributed to the several divisions upon the basis of percentages provided in the 7th clause of this decree, and with this mod-

165 ification of the master's report on said claim the exceptions filed thereto by purchaser Kneeland are hereby overruled, and to this ruling and decree on said claim, report, and exceptions thereto purchaser Kneeland excepts.

And the purchasers of the Southeastern Division, Dayton Division, and the Cincinnati Northern Division also except.

6. It is further decreed that the claim of the Smith Bridge Company, amounting to twenty-four hundred and six and $\frac{15}{100}$ ($2,406.15) dollars, be, and the same is hereby, allowed.

It is ordered and decreed that said sum of twenty-four hundred and six and $\frac{15}{100}$ ($2,406.15) dollars be paid to said Smith Bridge

Company out of the proceeds of sale of the St. Louis Division, extending from Kokomo, Indiana, to East St. Louis, Illinois, in pursuance of the terms, conditions, and requirements of the decree of foreclosure and sale of said St. Louis Division. This clause of this decree is entered by agreement and consent of the parties in interest, the said Smith Bridge Company consenting and agreeing in open court to accept in full satisfaction of said claim the principal thereof without interest.

166 7. It is further ordered, adjudged, and decreed that all of the indebtedness of Receivers Dwight and Craig incurred from August 1, 1883, to August 1, 1884, except car and equipment rental, which has been provided for by former decrees entered in these causes, and excepting such receivers' indebtedness incurred during said period from August 1, 1883, to August 1, 1884, as may be held and finally decreed to be a specific lien or local charge upon certain specified divisions of said railroad, shall be, and the same is, apportioned among the several divisions as follows:

Dayton Division	12.98%
Dayton and Southeastern Division	30.00%
Cincinnati Division	1.36%
Cincinnati Northern Division	4.16%
St. Louis Division and Toledo Division, including Toledo terminals	51.50%

The apportionment of the St. Louis Division and Toledo Division, including the Toledo terminals, is made in a single percentage by agreement of all parties in interest.

8. It is further ordered, adjudged, and decreed that the claim of the Iron railroad for forty-one thousand seven hundred and ninety-eight and $\frac{33}{100}$ ($41,798.39) dollars, reported and allowed by

167 Governor Cox, as special master, be, and the same is hereby, rejected and disallowed. The exceptions now allowed to be filed to the master's report allowing said claim are hereby sustained; and it is finally ordered, adjudged, and decreed that the said Iron railroad and the purchasers thereof at foreclosure sale take nothing by said claim and proceedings thereunder.

To which ruling in disallowing and rejecting said claim the purchasers of the Iron railroad and the bondholders holding bonds secured by the first mortgage upon said Iron railroad here now except by leave of the court granted, and they here now pray an appeal to the Supreme Court of the United States, which is granted upon their giving bond in the sum of one thousand dollars to the approval of the circuit court of the United States for the southern district of Ohio, western division.

9. It is further ordered, adjudged, and decreed that the claim for additional compensation for services as receiver presented by William J. Craig be, and the same is hereby, rejected and disallowed.

It is further ordered and decreed that the amounts hereto-

168 fore received by said Craig as receiver shall be, and hereby are, decreed to be a full payment and compensation for all his services as such receiver; and it is further ordered and decreed

that the said Craig be, and he is hereby, fully and finally discharged of and from all liability of his trust as such receiver, said receiver's compensation to be distributed to the several divisions upon the basis of percentage set forth in the 7th clause of this decree.

10. In making payment of their destributive portion of indebtedness of the receivership incurred from August 1, 1883, to August 1, 1884, as provided in the 7th clause of this decree, the purchaser or purchasers of the several divisions shall be entitled to and shall receive credit as between itself and all other divisions upon his or their distributive portion of said indebtedness for the amount already heretofore paid by him or them upon and in payment of indebtedness of the receivership incurred from August 1, 1883, to August 1, 1884.

It is further hereby ordered that any purchaser in paying into the registry of the court his distributive share of said receiver's
169 indebtedness incurred from August 1, 1883, to August 1, 1884, shall have credit upon his said distributive share for all of such indebtedness already paid by him or by the receiver of the division or divisions purchased by him after August 1, 1884, upon producing the vouchers evidencing such payments.

11. It is further ordered, adjudged, and decreed that the Iron railroad pay, in accordance with the finding and report of Master J. D. Cox, for car rentals and repair and loss of rolling stock one and $\frac{98}{100}$ per cent. of the total amount which may be owing from car rentals and loss and repairs of rolling stock by the Toledo, Cincinnati & St. Louis Railroad Company for the period during which said Iron railroad was in the hands of the receiver appointed in this cause.

To which judgment and decree the purchasers and first-mortgage bondholders of the Iron railroad except and pray an appeal, which exception and appeal are allowed by this court.

Said purchasers and first-mortgage bondholders of said Iron
170 railroad also except to the order discharging William J. Craig, receiver, and pray an appeal therefrom, which exception and appeal are also allowed upon the giving of the bond for appeal hereinbefore provided for.

12. All exceptions to the several reports of the masters heretofore filed herein and neither sustained in whole or in part by the above and foregoing decree are hereby overruled as to any and all matters herein determined.

All matters in any of these causes not finally disposed of by this or former decrees are hereby reserved for future determination.

13. It is further ordered, adjudged, and decreed that each of the said claims by this court determined and decreed to be paid shall draw interest at the rate of six per cent. per annum if the sums herein decreed to be paid shall not be paid to Noble C. Butler, clerk of the court, at Indianapolis, within thirty (30) days from the filing and entry of this decree from and after the expiration of said thirty days.

14. It is further ordered that as to the claim of Post & Company, which accrued after the 1st day of August, 1884, and shown in

schedule of the reports of Masters Fishback and Ricks, filed
171 March 10, 1887, shall be paid by the purchasers of the Toledo and St. Louis Divisions, and by agreement between said divisions the same is ordered to be paid by them jointly.

And the amounts decreed above in favor of Luce & Newton and of Martha and George Stebbins are chargeable upon and shall be paid out of the proceeds of the Toledo Division.

To which purchaser Kneeland and other bondholders, his associates, except.

And the bondholders and purchasers of the Southeastern, the Dayton, the Cincinnati, and the Cincinnati Northern Division severally except to paragraphs 3, 4, 5, and 7 of the foregoing decree, and pray an appeal therefrom, which appeal is allowed upon their giving bond herein in the sum of $500.

It is ordered that this decree be entered in all the causes pending in the sixth and seventh circuits.

It is further ordered that there be paid to A. J. Ricks, special master, for stenographer's services, indexing and transcribing the evidence on the reference of November 5th, 1885, the following sums, viz:

	For taking 2,464 folios of testimony @ 20c.	$492 80
172	For making copy of same for filing in court at Toledo	246 40
	For *per diem* of stenographer for time boxing, binding testimony, &c., 4 *per diems* @ $5	20 00
		$759 20

It is further ordered that there shall be paid R. P. Flood, stenographer, for drafting decree and making three copies thereof and for other stenographic services $28.00

It is further ordered that there be paid to Pomerene & Davis for stenographic services during the hearing of these cases $25.00.

173 And afterwards, to wit, at said May term, 1887, of said court, on the 16th day of May, 1887, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in said cause were had, to wit:

Comes now Sylvester H. Kneeland, purchaser of the Toledo, Cincinnati and St. Louis railroad, extending from Toledo, Ohio, to East St. Louis, Illinois, as such purchaser and representative of certain bondholders holding bonds secured upon said railroad so purchased by him as aforesaid, and prays the court for an appeal to the Supreme Court of the United States from so much of the decree entered herein on April 16, 1887, as requires said purchaser to pay the claim of Charles L. Luce and John T. Newton, amounting to $8,028.96, upon said purchasers giving supersedeas bond upon said appeal.

And the court now grants said appeal upon the giving by said Sylvester H. Kneeland, purchaser as aforesaid, of a supersedeas bond, with surety to be approved by the court, in the amount of $12,000.00;

and comes now the said Sylvester H. Kneeland and tenders
174 his supersedeas bond herein, signed by himself and the American Surety Company of New York; which bond is in the words following, to wit:

Know all men by these presents that we, Sylvester H. Kneeland, of the city and State of New York, principal, and the American Surety Company, a corporation created by and existing under the laws of the State of New York, are held and firmly bound unto Charles L. Luce and John T. Newton, their heirs, administrators, executors, and assigns, in the sum of twelve thousand dollars ($12,000.00), to be paid to the said —; for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 12th day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named Sylvester H. Kneeland has prosecuted and is to prosecute to the Supreme Court of the United States an appeal to reverse the final decree rendered in the above-en-
175 titled suit in favor of said Charles L. Luce and John T. Newton by the circuit court of the United States for the district of Indiana, said decree having been filed on the 16th day of April, 1887:

Now, therefore, the condition of this obligation is such that if the above-named Sylvester H. Kneeland shall prosecute said appeal to effect and answer all costs and damages if he fails to make the same good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SYLVESTER H. KNEELAND. [SEAL.]
AMERICAN SURETY COMPANY,
[L. S.] By RICH'D A. ELMER, *Pr.*
FRED. F. NUGENT, *Secretary.*

Signed, sealed, and executed and delivered in the presence of—
JOSEPH B. BRAMAN,
As to Sylvester H. Kneeland.
SAMUEL D. OSBORN,
As to Sylvester H. Kneeland.
H. G. HINTON,
As to Am. S. Co.
JOSEPH B. BRAMAN,
As to American Surety Co.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 14th day of May, 1887, before me personally appeared Richard A. Elmer, president of the American Surety
176 Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city

of New York; that he is the president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said *directors of said* company, and that he signed the instrument as president of said company by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 486, of the Session Laws of 1881; and the said Richard A. Elmer further said that he is acquainted with Fred. F. Nugent and knew him to be the secretary of said company; that the signature of the said Fred. F. Nugent subscribed to the said instrument is in the genuine handwriting of the said Fred. F. Nugent, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Richard A. Elmer.

H. G. HINTON,
Notary Public, Kings Co., N. Y.

Cert. filed in N. Y. Co.

177 At a meeting of the board of directors of the American Surety Company held at the office of the company on the 9th day of June, 1886, on motion, it was—

"Resolved, That in pursuance of chapter 416, Laws of 1886, amending section eight hundred and eleven of the Code of Civil Procedure, the president or vice-president be, and either of them are hereby, authorized and empowered to sign, execute, and deliver any and all bonds or undertakings and to attach thereto the seal of the company, and the same to be attested by the secretary or assistant secretary."

CITY AND COUNTY OF NEW YORK, *ss:*

I, Fred. F. Nugent, secretary of the American Surety Company, have compared the foregoing resolution with the original thereof as recorded in *in* the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 14th day of May, 1887.

[L. S.] FRED. F. NUGENT, *Secretary.*

178 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Before me, Joseph B. Braman, the undersigned, notary public, and also a commissioner of deeds for Indiana in New York, residing in said city of New York, on this fourteenth day of May, A. D. 1887, came Sylvester H. Kneeland, the principal named in the foregoing bond, and acknowledged the execution of the foregoing instrument, to wit, the foregoing bond.

In witness whereof I have hereunto — and affixed my [L. S.] official seals the day and year in this certificate last above written.

JOSEPH B. BRAMAN,

Commissioner of Deeds for the State of Indiana in and for the State of New York, Resident in said City of New York; Office, Equitable Building, Broadway, New York City.

JOSEPH B. BRAMAN,

Notary Public in and for the City and County of New York, in the State of New York, Resident in said City of New York; Office, Equitable Building, 120 *Broadway, New York.*

Which bond is here now approved by the court.

179 UNITED STATES OF AMERICA, *District of Indiana,* } *ss:*

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the matter of the intervening petition of Luce & Newton in the cause of The Central Trust Company *et al. vs.* The Toledo, Delphos & Burlington Railroad Company, The Toledo, Cincinnati & St. Louis Railroad Company *et al.*, No. 7706, as fully as the same appears of record and on file in my office.

Seal Circuit Court of the United States, District of Indiana.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 8th day of October, A. D. 1887.

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: Indiana C. C. U. S. No. 335. Sylvester H. Kneeland, appellant, *vs.* Charles L. Luce and John T. Newton. Filed February 28, 1888.

JAMES H. MCKENNEY,
(C. L. R. [illegible])

SUPREME COURT
OF THE
UNITED STATES.

SYLVESTER H. KNEELAND,
Appellant,
vs.
CHARLES E. LUCAS AND
JOHN T. NARON,
Appellees.

No. 336.
October Term, 1890.

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF IN BEHALF OF APPELLANT.

BY JOHN M. BUTLER.

SUPREME COURT

OF THE

UNITED STATES.

SYLVESTER H. KNEELAND,
Appellant,
vs.
CHARLES L. LUCE AND
JOHN T. NEWTON,
Appellees.

No. 335.
October Term, 1890.

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF IN BEHALF OF APPELLANT.

STATEMENT.

This suit was an intervening petition in the case of the Central Trust Company et al. vs. Toledo, Delphos and Burlington Railroad Company et al. The appellees claimed to be entitled to recover for unpaid purchase money for right of way in the city of Toledo, contracted to be sold and conveyed to E. B. Phillips, trustee for the Toledo, Delphos and Burlington Rail-

road Company, prior to its consolidation with the Toledo, Cincinnati and St. Louis Railroad Company. Appellees further claimed that their claim for unpaid purchase money was entitled to priority of lien over first mortgage bonds of the Toledo, Delphos and Burlington Railroad Company.

The Circuit Court for the District of Indiana so held, and decreed that appellant, Kneeland, as purchaser under the foreclosure sale of the Toledo, Delphos and Burlington Railroad Company, known as the Toledo Division of the Toledo, Cincinnati and St. Louis Railroad Company,—which Division extended from Toledo, Ohio, to Kokomo, Indiana,—should pay the same as a claim prior in equity to the first mortgage bonds of the Toledo, Delphos and Burlington Railroad Company.

This right of way was procured from the appellees, under a contract which does not appear in this record, and which is apparently lost. This contract is, however, referred to in the case of *Central Trust Company et al.* vs. *Sylvester H. Kneeland*, No. 137, October Term, 1890, recently decided in this Court, and is sufficiently described in the printed record of that appeal now on file in this Court at pages 459, 460.

In that case it appears that a part of the record in the case of *Central Trust Company et al.* vs. *Toledo, Delphos and Burlington Railroad Company et al.*, in the U. S. Circuit Court for the Western Division of the Northern District of Ohio, was put in evidence. In this last mentioned case, the contract and deed from Newton and Luce, appellees herein, to the Toledo, Delphos and Burlington Railroad Company, was put in evidence as an exhibit to the testimony of appellants, before Special Master Ricks.

As the case of the *Central Trust Company, et al.* v. *The Toledo, Delphos and Burlington Railroad Company* was practically the same case in the Circuit Courts of both Ohio and Indiana, the record in the Ohio case may be treated as a part of the record in this case.

By stipulation in Court, in the case at bar, it is agreed "that the testimony heretofore taken and filed in this cause, under the reference to A. J. Ricks, Special Master, may be used in any future litigation touching Toledo terminal property with the same effect as though originally taken therein." (Record p. 34.)

From the record in the Ohio case it appears that there were produced and offered as exhibits to the complainant's testimony:

"Contract between Martha Stebbins and George Stebbins and John T. Newton and Charles L. Luce and Elijah B. Phillips for the conveyance of a right of way as described in the contract and particularly described in the deeds that follow (attached and marked Exhibit No. 35,) being the same contract set up in the answer of Luce and Newton and the Stebbinses, filed herein."

"Deed from Charles L. Luce and wife and John T. Newton and wife to Elijah B. Phillips, trustee, dated March 27, 1883, conveying right of way for a railroad track or tracks a strip or parcel of land in the city of Toledo 40 feet in width and 20 feet on either side of a center line, particularly described in the deed. *This deed was deposited with C. H. Scribner and is still held by him in escrow*, being under the contract Exhibit 35."

(Record in *Central Trust Company et al.* vs. *Sylvester H. Kneeland*, No. 137 October Term, 1890, pp. 459, 460.)

In the decree regarding the claims of these appellees, made in the case of *Central Trust Company et al.* v.

The Toledo, Delphos and Burlington Railroad Company et al., in the United States Circuit Court for the Western Division of the Northern District of Ohio, which decree is a part of the record herein, (Record p. 50,) it is found:

"That neither of said defendants herein conveyed to said Toledo, Cincinnati and St. Louis Railroad Company or to any one for it, by any deed or deeds which have been delivered or become operative, any part of said right of way so sold, but said company purchased and holds the same under the contract set forth in paragraph 3 of said answer and attached to said answer, subject to the payment of said sums of purchase money so due the defendants, as above found."

By this decree $8,028.96 is found and decreed to be due to appellees under their contract for sale of right of way.

The United States Circuit Court for the District of Indiana so decreed, and also decreed, after the foreclosure sale of the property of the Toledo, Delphos and Burlington Railroad Company, (known as the Toledo Division of the Toledo, Cincinnati and St. Louis Railroad Company,) and its purchase by appellant Kneeland, that "the amounts decreed in favor of Luce & Newton * * * are chargeable upon and shall be paid out of the proceeds of the Toledo Division." (Record p. 61.)

Appellant Kneeland appealed from so much of said decree "as requires said purchaser to pay the claim of Charles L. Luce and John T. Newton, amounting to $8,028.96." (Record p. 64.)

ASSIGNMENT OF ERRORS.

1. *The Circuit Court erred in decreeing payment of the claim of Luce and Newton, appellees, to the amount of*

$8028.96, out of the proceeds of foreclosure sale of the Toledo Division of the T., C. & St. L. R. R. in preference to T., D. & B. R. R. Co. first mortgage bonds.

2. *The Circuit Court erred in decreeing that the amount of $8028.96, decreed to be due to appellees, Luce and Newton, is chargeable upon, and is to be paid out of the proceeds of foreclosure sale of the entire railroad extending from Toledo, Ohio, to Kokomo, Indiana. If appellees have any lien at all, it should by the decree have been limited and confined to the right of way described in the contract between appellees and the railroad company.*

ARGUMENT.

I.

APPELLEES ARE CERTAINLY NOT ENTITLED TO PRIORITY OVER FIRST MORTGAGE BONDHOLDERS, AS TO THE ENTIRE RAILROAD FROM TOLEDO TO KOKOMO. EVEN IF THEY ARE ENTITLED TO A VENDORS' LIEN, THAT VENDORS' LIEN COULD ONLY ATTACH TO AND COVER THE RIGHT OF WAY DESCRIBED IN THEIR CONTRACTS WITH THE COMPANY.

ON THE FACTS STATED, APPELLEES ARE NOT ENTITLED TO A VENDORS' LIEN.

That appellees cannot recover unless they are lienors, is a proposition that requires no argument.

The appellees do not claim to be entitled to an express lien. They must, therefore, rely upon the claim that there is an *implied lien* in their favor. The species of implied lien which most nearly approaches in character to the lien which the appellees are evidently endeavoring to assert is the lien which the law gives to the vendor of real estate who has conveyed his land but has not received the purchase money which is agreed to be paid as the consideration for his grant. This species

of lien is commonly known as the implied vendor's lien for unpaid purchase money.

This implied vendor's lien is not favored. Chief Justice Marshall, in *Bayley* v. *Waldo*, 7 *Wheaton*, 46, at pages 57, 58 said:

"The lien of the vendor, if in the nature of a trust, is a secret trust. * * * In the United States, the claims of creditors stand on high ground. There is not perhaps a State in the Union, the laws of which do not make all conveyances not recorded, and all secret trusts, void as to creditors as well as subsequent purchasers without notice. To support the secret lien of the vendor against a creditor, who is a mortgagee, would be to counteract the spirit of these laws."

See also, *Jones on Mortgages*, Sec. 191.

Consequently, the doctrine is not to be extended, and that is not to be considered a vendor's lien which arises out of any other transaction than the actual conveyance of land and the non-payment of the purchase money.

In this case there has been *no conveyance of either the fee or the easement.* A contract has been made fixing the price to be paid for the easement, but no deed has ever been delivered.

There having been no *conveyance* of the right of way to the railroad company, it would have been impossible for the railroad company to have created an *express lien* on the right of way, in favor of or against these appellees. Consequently, there can be no implied lien.

The land in question is attempted to be *contracted away*, not conveyed. There is not even an *actual sale* of the land, with a condition that the title shall remain in the vendor until the purchase money is paid. Hence,

this case does not resemble the case of a *conditional sale* of personal property.

The real estate was placed in the *possession* of the Railroad Company by the *license* of the appellees under a *contract* of the Railroad Company to pay the price agreed upon.

There is therefore no implied vendor's lien, and no right similar to that of the purchaser of personal property by conditional sale.

The fact that the deed of this right of way is lying in escrow, does not make this the case of an equitable mortgage arising from the fact that the title deeds are deposited as security for advances. It would be essential to an equitable mortgage of this kind that the deed of the right of way should have been delivered to the *purchasing* railroad company, and should then have been delivered *by the purchasing railroad company* in escrow as security. But such equitable mortgages are not permitted in this country, because contrary to our recording system.

Jones on Mortgages, Sec. 185.

Neither are the appellees entitled to a lien under the provisions of the bill of rights of Ohio, preventing the *taking* of property without compensation. There has been no *taking* of property, but a *contract* of *purchase* and sale of an easement, necessarily implying the assent of the vendor. Hence, the decisions which give a lien to purchasers, whose property has been *appropriated*, without their consent, for the use of railroads, have no application.

The appellees have allowed the railroad company to take possession of the right of the right of way in

question, under a parol license, and have therefore elected to rely for their security solely upon their legal right to revoke the license and become revested with the possession. They did not contemplate that they should have any lien whatever upon the property. They did not intend to part with the title until the purchase money was entirely paid. They could not have been compelled to convey the title until the purchase money was fully paid, and they could not have been restrained from revoking their license, until sufficiently long time had elapsed to permit the railroad company to make such extensive and valuable improvements on the right of way as to justify a court of equity in interfering and restraining a revocation, on the ground of equitable estoppel.

The law upon this subject is stated in *Wood's Railway Law*, Sec. 211, as follows:

"A railway company may enter upon lands and construct its roadway under a parol license from the owner, and is protected by such license from all the necessary consequences of the construction and operation of its road, as much as it would be under a deed, or proceedings under the statute; but such license is revocable at the will of the land-owner, and from that moment the right to maintain the road there ceases. But until revoked it is a complete protection against the necessary consequences of the act. In those cases where assent has been given to one by another to do a certain act upon his land, the natural and probable consequences of which are to produce a certain result, and the person to whom assent is given goes on and expends money on the strength of the assent, and makes erections of a permanent character,—while the assent does

not give any interest in the land, and at law is revocable at any time, even though given for a consideration, yet a court of equity, in a proper case, will enforce it as an agreement to give the right, and, particularly, where its revocation would operate as a fraud upon the licensee, or would be productive of great hardship, will restrain its revocation."

It thus appears that the contract under which the appellees claim to be entitled to a lien in the nature of a vendor's lien, fails entirely of accompliishing one of the essential elements of a vendor's lien, to-wit: the conveyance of the title of the property, on which the lien is claimed, to the purchasing railroad company. As the purchasing railroad company obtained nothing by virtue of the contract itself which the vendors could not have taken back for a considerable period of time after the contract was executed, and as the law never implies a vendor's lien except upon the ground of the presumed intention of the parties, no vendor's lien can be implied where the actions of the parties themselves show that it was their intention that the security of the vendor should lie in the fact that he had a right to retake the land itself. On the facts, therefore, the appellees are not entitled to a vendor's lien on the land mentioned in their contract, and their only security for the purchase money is their right to retake the right of way mentioned in their contract within the time and in the manner permitted by law.

The appellees, therefore, acquired no lien whatever, either as vendor's lien, or as equitable mortgage upon the land described in their contract with the railroad company, at the time of the execution thereof.

II.

EVEN IF ON THE FACTS STATED, THE APPELLEES MIGHT UNDER SOME CIRCUMSTANCES BE ENTITLED TO A LIEN UPON THE LANDS DESCRIBED IN THEIR CONTRACT WITH THE COMPANY, SUCH LIEN COULD COME INTO EXISTENCE ONLY ON BEING DECREED IN A CASE WHERE THE RAILROAD COMPANY, OR ITS REPRESENTATIVES, WERE SUING TO ENJOIN APPELLEES, AS LICENSORS OF THE RIGHT OF WAY, FROM REVOKING THEIR LICENSE, ON THE GROUND OF EQUITABLE ESTOPPEL. THIS IS NOT SUCH CASE, BUT IS SIMPLY A CONTEST BETWEEN APPELLEES AND FIRST MORTGAGE BONDHOLDERS FOR PRIORITY OF PAYMENT OUT OF PROCEEDS OF FORECLOSURE SALE.

The appellees, Luce and Newton, are parties to this cause as defendants to the amended bill in the case of *Central Trust Company, et al.* v. *Toledo Delphos & Burlington Railroad Company*, in the United States Circuit Court for the District of Indiana.

The amended bill reads: "And your orators further aver that they are informed and believe that E. B. Phillips, Charles L. Luce, John T. Newton, Martha Stebbins, George Stebbins, and Thomas H. Hamilton are asserting and claiming some right or interest in some of the lands and property in the city of Toledo, belonging to and equitably the property of said Toledo, Delphos & Burlington Railroad Company, and its successor, the Toledo, Cincinnati & St. Louis Railroad Company, and subject to said first mortgage of January 17, 1880, wherefore they are made defendants to answer as to any right or interest claimed by them or either of them." (Record, p. 18.)

The prayer of the amended bill is that appellees be made defendants. (Record, p. 23.)

The further prayer of the bill is: "And your orator prays that the Toledo, Delphos & Burlington Railroad Company first mortgage executed and dated January 17, 1880, may be held and decreed to be a first and paramount lien upon all the property, railroad, tracks, buildings, superstructures, *rights of way*, lands, depot grounds, privileges, franchises and all terminal facilities at and within the said city of Toledo, that at any time belonged to or were acquired by the said Toledo & Maumee Narrow Gauge Railroad Company and that belonged to or were acquired by the Toledo, Delphos & Burlington Railroad Company." (Record, p. 24.)

It thus appears that the object of the bill is to determine the *priorities* between the holders of two classes of alleged securities.

It appears from the record that the appellees appeared and answered in the original foreclosure suit, but in the United States Circuit Court for the western division of the northern district of Ohio, (Record p. 49) but the answers are not in the record. Nor does the record show the filing of any answers in the Indiana cause, or the filing of any cross bill by the appellees in either court.

Consequently the appellees do not appear to be before the court *affirmatively* asking any lien to be declared in their favor.

The question presented by this record is simply: If the appellees are entitled, on the facts, to any lien whatever even on the land or right of way described in their contract with the company, are they entitled to such lien prior to that of the first mortgage bondholders?

The railroad company is not seeking to enjoin the appellees from revoking their license to occupy the

right of way described in the contract between the appellees and the railroad company. It is a defendant like the appellees, and seeks no relief whatever against the appellees.

III.

IF THE APPELLEES WERE ENTITLED TO A LIEN UNDER ANY CIRCUMSTANCES, SUCH LIEN WOULD NOT BE ENTITLED TO PRIORITY OVER THAT OF FIRST MORTGAGE BONDS, BECAUSE THE RIGHT OF WAY ON WHICH THE LIEN IS CLAIMED WAS INTENDED BY APPELLEES TO, AND DID IN FACT BECOME AFFIXED TO AND A PART OF THE WHOLE RAILROAD, IF IT WAS EVER USED AS RIGHT OF WAY FOR SAID RAILROAD, AND THE APPELLEES BY ALLOWING THEIR LAND TO BE OCCUPIED BY THE RAILROAD COMPANY, IF IT HAS BEEN SO OCCUPIED, ARE HELD TO HAVE CONSENTED THAT THE PROPERTY SHOULD COME UNDER THE FIRST MORTGAGE LIEN.

A portion of the right of way of a railroad is not capable of being treated as a thing separate and distinct from the railroad itself.

It is the settled law of this Court that liens upon property which comes into the possession and use of a railroad company, can be sustained only when the property which is sought to be charged with such a prior lien is "loose property susceptible of separate ownership," as distinct from "any material which became affixed to and a part of the principal thing."

United States v. New Orleans Railroad Co., 12 Wall. 362 at p. 365.

Fosdick v. Schall, 99 U. S. 235 at p. 251.

Right of way for a railroad connot possibly be considered as "loose property susceptible of separate ownership." Consequently we claim that no lien what-

ever, even by mortgage, can be obtained on right of way property without the consent of the first mortgage bondholders.

Galveston Railroad Company v. Cowdry, 11 Wall. 459.

Willink v. Morris Canal & Canking Co., 3 Green's Ch. (N. J.) 402.

Fisk v. *Potter*, 2 Keyes, (N. Y.), 64.

Bayliss v. *LaFayette M. & B. R. R. Co.*, 8 Reporter, 579.

Pierce v. *Milwaukee & St. Paul R. R. Co.*, 24 Wis., 551.

The case of *Pierce* v. *Milwaukee R. R. Co.*, above cited, was a case where an implied vendor's lien for unpaid purchase money for right of way was sought to be decreed prior to the lien of a mortgage executed by the railroad company covering after-acquired property. The Court said, (page 554):

"It is apparent that the Lowry mortgage purported to include the right of way across the plaintiff's land, which was the subject matter of the conveyance from him to the company. It is true, the title to those premises was not in the company when the mortgage was executed; but it is perfectly clear that it was the intention of the parties that the mortgage should become a lien upon any right or interest in real estate subsequently acquired for right of way, or necessary for the use of the road. It is insisted in the brief of the counsel for plaintiff, that the instrument did not purport to mortgage future acquired realty; but a bare reference to the clauses which have been cited will show that this view is inadmissible. It obviously purports to convey as well the real and personal property belonging to the com-

pany at the time of the execution of the mortgage, and therein described, as all real and personal property subsequently acquired for the use of the road. The language employed is not fairly susceptible of any other construction. And, this being so, it is very manifest that when the company subsequently acquired an interest in these premises, from that moment the mortgage became a lien and charge upon them."

Under a similar state of facts, the Court of Appeals of the State of New York said in the case of *Fisk* v. *Potter*, 2 Keyes, (N. Y.), 64, at page 76: "He took no written mortgage. Whenever the law gives this lien to the vendor, it gives it to him only for the purpose of working out an act of justice for him. The lien does not exist in his favor as an inflexible rule, and if it ever did, it ceases to exist when circumstances justify such a conclusion. It would be the clearest injustice to hold its existence, under the circumstances above stated, against *bona fide* mortgagees and bondholders, who have advanced their money on the faith of a clear public record as to title and incumbrances. It would be carrying the doctrine of these secret liens to an extent never before carried in any reported case in this State. It would overturn the case of *Bayley* v. *Greenleaf;* it would render insecure all dealing in titles, and the object of, and securities intended by, our recording acts would, in effect, be destroyed."

In the case of *Bayliss* v. *LaFayette M. & B. R. R. Co.* 8 Reporter 579, Hon. Thomas Drummond, U. S. Circuit Judge, said, in a case where a vendor's lien for right of way was sought to be decreed prior to the lien of first mortgage bonds:

"The claim of Margaret Griffin, for right of way, I cannot act upon at this time. I must leave her rights and equities, whatever they may be, to the adjudication of the courts. That question has frequently been before this court. We act upon this principle. That every claim of this kind, acquired by the railroad company, after it has executed a mortgage, *is subject to the prior rights of the mortgagees.* It is competent for the mortgagees to accept the action of the railroad company, and so to allow the claim to be paid, or to reject it, provided they or the court are of opinion, upon a proper presentation of the case, that it is not indispensable for the operation of the road."

The words of Mr. Justice Bradley in delivering the opinion of this court in *Galveston* v. *Cowdrey*, 11 Wall. 459, at p. 481, seem to be strong authority against the contention of appellees. The words referred to are:

"Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existance, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust deeds could safely given be given thereon. The practice of the country and its necessities are in coincidence with the rule."

IV.

IF THE APPELLEES ARE ENTITLED TO ANY LIEN WHATEVER, IT IS UPON THE SPECIFIC RIGHT OF WAY AGREED TO BE CONVEYED, AND NOT, AS WAS DECREED BY THE CIRCUIT COURT, UPON THE WHOLE PROPERTY AND FRANCHISES OF THE TOLEDO DIVISION.

Even though it be assumed that the appellees are entitled to a lien for the balance of their unpaid purchase money, and that it is a lien prior to that of the first mortgage bonds, which we deny, it is evident that, in its inception, the lien could not possibly have covered anything except the right of way which was agreed to be conveyed. There is plainly no equity, in a case where no fraud or wrong is charged on the part of either party, in holding that the vendor of a right of way obtains a lien prior to first mortgage bonds, on property worth perhaps thousands of times the value of the right of way conveyed by him.

The only principle upon which the Circuit Court could possibly have rendered such a decree is, it would seem, that the easement agreed to be granted by the appellees is so inextricably confused with the whole property of the railroad company that no other relief was possible. But the doctrine of confusion does not apply to land or interests in land, but only to chattels, and those persons only are required to suffer the possible loss of their property who by their *wrongful act* have caused the property of some individual to be intermingled and confused with their own in such manner that its identity is lost. On the facts disclosed by the record no possible wrong has been committed by the first mortgage bondholders against the appellees. The appellees, with knowledge of the rights of the bondholders, have

voluntarily permitted the right of way agreed to be granted to be used as a part of the whole property of the railroad company and have allowed the franchises of the railroad company and the rights of the public to attach to said right of way.

There is no reason, in equity or justice, why the original lien of the appellees which confessedly, if it existed at all, covered only the specific right of way described in their contract with the railroad company, should be held to cover the whole Toledo Division and franchises of the corporation appertaining thereto.

If the lien exists at all as against the first mortgage bondholders, it is a lien against the specific right of way described in appellees contract, and nothing more.

That there are difficulties in the way of holding that the lien exists on the specific right of way, is no reason for applying the lien to the whole property and franchises of the railroad company. Such difficulties are simply an additional reason why the lien claimed by appellees ought to be held not to exist at all.

Appellant Kneeland asks that the decree of the Circuit Court allowing the claim of the appellees as a claim to be paid out of proceeds of sale of the Toledo Division, in preference to first mortgage bonds, be reversed.

Respectfully submitted,

JOHN M. BUTLER,
Of Counsel for Appellant.

Indianapolis, Ind., April 18, 1891.

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JAMES H. McKENNEY,
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SUPREME COURT
OF THE
UNITED STATES.

SYLVESTER H. KNEELAND,
Appellant,
vs.
CHARLES L. LUCE AND JOHN T. NEWTON,
Appellees.

No. 88.
October Term, 1891.

Appeal from the Circuit Court of the United States, for the District of Indiana.

REPLY BRIEF IN BEHALF OF APPELLANT.

BY JOHN M. BUTLER.

SUPREME COURT
OF THE
UNITED STATES.

SYLVESTER H. KNEELAND,
Appellant,
vs.
CHARLES L. LUCE AND JOHN T. NEWTON,
Appellees.

No. 38.
October Term, 1891.

Appeal from the Circuit Court of the United States, for the District of Indiana.

REPLY BRIEF IN BEHALF OF APPELLANT.

The statements and arguments appearing in the two briefs filed by counsel for appellees, warrant a brief reply.

This case involves a claim asserted by appellees against the purchase money fund arising from the foreclosure sale of that portion of the Toledo, Cincinnati and St. Louis Narrow Gauge Railroad, extending from Toledo, Ohio, to Kokomo, Indiana, for a certain strip of land along and near to the bank of the Maumee River, in the City of Toledo.

The claim is asserted and pressed as a claim prior in equity to the first mortgage bonds covering said rail-

road, on the ground that this land was contracted for for the purpose of using it as a right of way.

This land never has been used as a right of way, either by the railroad company prior to the foreclosure sale, or by Mr. Kneeland and the railroad company organized by him after his purchase under the foreclosure sale. No railroad track has ever been put upon this land. It never has been used in connection with the railroad in any way whatever.

This fact, although not expressly admitted by counsel for appellees, is fully admitted, by inference, in statements made by counsel for appellees on page 2 of his supplemental brief. Counsel there states that the strip of land involved in this cause was not included in the litigation concerning the Toledo Terminals, heard and determined by this Court in cause No. 137, October Term, 1890, *Central Trust Company of New York, et al.*, v. *Sylvester H. Kneeland.* This Court will well remember that that cause did involve *all* of the lands, rights of way and terminal property in the City of Toledo, *possessed and used* by the Toledo, Cincinnati and St. Louis Railroad Company, *as right of way and terminal facilities.*

A glance at the map attached to and made part of the record in the above mentioned cause of *Central Trust Company of New York, et al.*, v. *Kneeland*, No. 137,—October Term, 1890,—will show that the strip of land here involved constitutes a part of the at one time proposed approach to the dock property involved in the cause of *Toledo, Delphos and Burlington Railroad Company* v. *Hamilton*, decided by this Court and reported in 134 U. S., 296.

It is, therefore, certain that if the decree here

appealed from is affirmed, Mr. Kneeland and the bondholders represented by him, will be obliged to pay out of the purchase money fund arising from the foreclosure sale, as prior in equity to their first mortgage bonds, a claim for land that never has been possessed or used as right of way, or in any other manner connected with, or for the use and purpose of, the railroad.

It further appears from the record in this cause, and the other causes hereinabove mentioned, that no deed or conveyance of this strip of land has ever been delivered to or received by the T., C. & St. L. R. R. Co., or Kneeland, or the new company organized by Kneeland. In 1883, Luce and wife and Newton and wife executed to Elijah Phillips, Trustee, a conveyance of the right to construct and operate a railroad over this strip of land, and deposited such conveyance with Mr. C. H. Scribner, of Toledo, such conveyance to be held by him in escrow until full payment according to agreement, and said Scribner still holds such conveyance of said easement. This fact is set out in the testimony in the printed record of cause No. 137, October Term, 1890, *Central Trust Company of New York, et al.*, v. *Kneeland*, as quoted in my original brief herein, on page 3.

Unless, therefore, a mere contract to convey an easement or right of way over land,—which contract was made some three years after the mortgage was executed and the bonds issued and sold; which contract has never in fact been delivered; and which land has never been possessed or used as right of way, or for any other use or purpose connected with the railroad,—is prior in equity to first mortgage bonds, this decree ought to be reversed.

Mr. Kneeland and the new company organized by him, do not want this land. Why should the bondholders be required to pay for it out of the few cents on the dollar left to them as proceeds of the foreclosure sale?

Much stress is laid by counsel for appellees upon the decree rendered by Judge Welker, in the Court at Toledo, Ohio, in favor of Luce and Newton, December 12, 1885. And it is asserted that Kneeland's failure to appeal from that decree, bars him from any relief in this Court upon this appeal. That decree rendered by Judge Welker, could not by any possibility have any binding force or effect as against Kneeland. Judge Welker's decree was rendered December 12, 1885. The foreclosure under which Kneeland became purchaser, did not take place until December 30, 1885.

The United States Circuit Court for the District of Indiana, was and is the home of this litigation. It has always been so known and recognized by all parties and claimants. The foreclosure decree rendered November 12, 1885, expressly required all claims against the purchase money fund arising from the foreclosure sale, to be presented to the United States Circuit Court for the District of Indiana. (Record, pp. 34, 35.)

The orders of reference appointing Cox, Ricks and Fishback, Masters to take evidence and report on claims, all required them to make their reports to the Indiana Court,—the home of the litigation.

(Record, pp. 48, 49.)

By the foreclosure decree the purchase money fund arising from the foreclosure sale came into, and was to be distributed from, the Registry of the United States Circuit Court for the District of Indiana; and all claim-

ants against said purchase money fund were required to file and present their claims to the Circuit Court of the United States for the District of Indiana.

(Record, pp. 25 to 34.)

The foreclosure decree under which Kneeland purchased expressly reserved to him the right to appeal from all decrees requiring payment, out of the purchase money fund, of all claims decreed to "be prior and superior in equity to the lien" of the first mortgage bonds. (Record, p. 34.)

Appellees, Luce and Newton, recognized the binding force of these decrees and orders, and in obedience thereto, filed the decree they had obtained in Toledo, prior to the foreclosure sale, *as their claim against the purchase money fund arising from the foreclosure sale.*

Counsel for appellees in his original brief, at page 9, admits this fact.

The description of the land set forth in this claim of Luce and Newton,—Record p. 50,—proves the correctness of the above statements as to its location along the bank of the Maumee River. This Court knows from records before it of other cases already decided, that no use has ever been made of this land by the T. C. & St. L. R. R. Co., for right of way, or for any other railroad purpose.

The decree entered by Judge Welker, at Toledo, December 12, 1885, cannot bind the purchase money fund,—which then had no existence, and which by the foreclosure decree came into the possession and control of the United States Circuit Court for the District of Indiana the instant it was created.

The only purpose that the decree rendered by Judge Welker, in favor of appellees, served, was that it consti-

tuted a *prima facie* claim for presentation to the Masters, and rendered it unnecessary for appellees to take testimony as to the amount in said claim asserted, unless the correctness of that amount was attacked and questioned.

Mr. Kneeland's proper time, and only time, to appeal was when the United States Circuit Court for the District of Indiana *decreed payment of this claim out of the purchase money fund, in preference to the payment of first morgage bonds.* This he did promptly.

(Record, pp. 61, 64.)

It is alleged that this claim is not "court and receiver's indebtedness," and does not, therefore, fall under the right of appeal reserved to Kneeland, as purchaser by the foreclosure decree under which he purchased. This is a mere play upon words. The meaning of the 16th clause of the foreclosure decree,—Record p. 34,—is perfectly plain. That decree intended to give, and did give, to the purchaser at the foreclosure sale, the right to defend against *any* claim asserted against the purchase money fund arising from the foreclosure sale; and to appeal to this Conrt from any decree decreeing *any* claim to "be prior and superior in equity to the lien" of the first mortgage bonds. The words of the 16th clause of the foreclosure decree above cited, will not bear the interpretation sought to be put upon them by counsel for appellees; but even if they did, that would make no difference, because all debts and claims asserted against the purchase money fund arising from the foreclosure sale, might properly be classed as "court and receiver's indebtedness," because the Court has the entire proceeds of sale in its possession as a Court fund.

Seizure of the property by the Court, and its sale by the Court under the foreclosure decree, made *all*

valid claims against that purchase money fund, Court debts.

The right of Mr. Kneeland as purchaser, and as representative of the first mortgage bondholders, to appeal from any and every decree ordering payment out of the purchase money fund in the Registry of the United States Circuit Court for the District of Indiana, which is the only Court Kneeland had to deal with after his purchase,—is perfect and complete. This question is settled and the proper construction of this foreclosure decree is fixed and concluded by the decision of this Court in *Kneeland* v. *American Loan and Trust Co.*, 136 U. S., 91 to 95.

The position assumed by counsel for appellees, that this decree cannot be appealed from by Mr. Kneeland because it is *a right of way claim*, and therefore sacred and superior in equity to first mortgage bonds, is untenable. This position might have some force as to *original right of way actually possessed and used as such.* But no such sacredness or superior equity attaches to this claim. It is for an easement over land contracted for in March, 1883, (Record in cause 137, October Term, 1890, *Central Trust Company, et al.*, v. *Kneeland*, at pages 459, 460), after the railroad was in operation, and some three years after the first mortgage bonds were issued and sold. The land has never been used for right of way or any other railroad purpose. No conveyance of the easement has ever been delivered. If it could be regarded as after acquired property, still the first mortgage bonds,—under repeated decisions of this Court cited in my original brief in this cause,—could only attach to such interest in the easement *as the railroad company has paid for.* The Company has paid nothing for this

easement, therefore the mortgage never attached to it at all.

Is it not incongruous to claim that the proceeds of foreclosure sale of the property covered and conveyed by the mortgage must be taken to pay for property to which that mortgage never attached?

But, as before stated, the foreclosure decree plainly gives Kneeland, as purchaser and representative of the bondholders, the right to contest *any and every claim* asserted against the purchase money fund, and to appeal from any decree decreeing any claim to be prior and superior in equity to the lien of first mortgage bonds, and decreeing payment out of the purchase money fund in preference to said first mortgage bonds.

The only decree touching appellees' claim, that could ever reach the purchase money fund, was the decree of the United States Circuit Court for the District of Indiana, rendered April 16, 1887,—Record, pp. 56 to 64,—and from that decree Mr. Kneeland promptly prosecuted this appeal. (Record, pp. 64, 65.)

This is, in effect, admitted by counsel for appellees in his original brief at pages 14, 15. Counsel there admits that the Ohio decree, rendered by Judge Welker, December 12, 1885, and before the foreclosure sale under the foreclosure decree of the United States Circuit Court for the District of Indiana took place, "was filed in the Indiana Court where the principal proceedings were carried on and into whose Registry the proceeds of the sale were paid." Why was it so filed? Unquestionably that was the only way in which appellees could get a decree for payment out of the purchase money fund.

Counsel for appellees, in the same sentence from

which the above quotation is made, further admits that the Ohio decree was submitted to "two special Masters" as the *claim* of appellees. Why was this done if the Ohio decree was final and reached the purchase money fund in the Registry of the United States Circuit Court for the District of Indiana?

The answer is plain. Appellees and their counsel well knew that the Ohio decree was a *nullity*, except in so far as it tended to make out a *prima facie* case in favor of appellees.

The Ohio deeree was filed by appellees in the Circuit Court of the United States for the District of Indiana, simply as their *claim* against the purchase money fund, and as a claim already liquidated *as to amount.* They wanted to reach the purchase money fund, and wanted a new decree in order to reach that fund. They, therefore, filed their claim in the United States Circuit Court for the District of Indiana, pursuant to the express requirement of the foreclosure decree of November 12, 1885, and submitted it as *their claim* to special Masters Ricks and Fishback.

(Original brief in behalf of Appellants, pp. 9, 14, 15.)

Again it is insisted that no sufficient exception was made by Kneeland to the Masters' report approving the amount fixed by Judge Welker in the Ohio decree, and allowing the claim. No exception at all was necessary on the part of Kneeland, *until a direct attack was made on the purchase money fund.*

Mr. Kneeland never questioned, or cared to question, the amount fixed by the Ohio decree. He knew that the easement over this land had never been used as right of way, or for any railroad purpose. He further knew that the railroad company had never paid the

contract price for the easement, and had never received any conveyance thereof. He therefore believed, and certainly with good reason, that the mortgage, under foreclosure of which he became purchaser, *never attached to this easement at all;* and that the owners of the land over which the easement had been contracted for, never having parted with title to the land, and the land never having been used for right of way or any railroad purpose, would hold their lands, and *nothing else*, as security for the performaace of their contract with the railroad company to deliver a conveyance of the easement when paid for. Is not this reasonable, just and equitable? All of Mr. Kneeland's interest, touching any claim against the railroad company or its Receivers, consisted in jealously guarding the purchase money fund.

On September 21, 1886, Mr. Kneeland did file exceptions to Master Fishback's report covering claims included in the third, fourth and fifth interlocutory reports of Special Master Ricks.

(Record, pp. 54, 55, 56.)

The third exception is surely broad enough to cover the claim of appellees, even if any exception had then been needed on the part of Mr. Kneeland, which we deny.

In April, 1887, after wide notice by publication had been given to all claimnants against the purchase money fund, and their counsel, a full and final hearing took place at Cleveland, Ohio, that point being selected for convenience of Boston and New York claimants and counsel, before Judges Gresham and Jackson. At this final hearing, every thing in every Masters report, from the preliminary report of Governor Cox, filed in the earliest stages of the litigation, to the last report filed by

Master Fishback, only a few days before the hearing, was regarded as excepted to, in so far as the question of priority over the lien of the first mortgage bonds was concerned, and the whole matter of what claims, and what classes of claims, should be allowed priortiy over the first mortgage bonds, and be decreed to be paid out of the purchase money fund, and what claims and classes of claims should be rejected, was presented and considered. This hearing included the claim of appellees. This hearing resulted in the decree of April 16, 1887, from which this appeal is prosecuted.

(Record, pp. 56, 64.)

This decree of April 16, 1887, was the first and only decree against the purchase money fund, in favor of appellees. It required the claim of appellees to be paid out of the purchase money fund, on the ground that it is prior and superior in equity to the lien of the first money bonds upon that fund. (Record, pp. 57, 64.)

Kneeland then and there excepted to this ruling and decree, in favor of appellees. (Record, p. 61.)

Counsel for appellees objects that this exception does not state the ground upon which it is based. It was wholly unnecessary to make any specific statement of the ground of exception. There was but one ground, everybody knew that. The ruling and decree excepted to, held appellees claim prior and superior in equity to the lien of the first mortgage bonds, and required its payment out of the purchase money fund in preference to said bonds. To that Kneeland excepted. No amount of words could make his exception clearer or more specific than it is. Kneeland followed up his exception by promptly appealing to this Court.

(Record, pp. 64, 65.)

It is asked that this reply brief may be considered in connection with the original brief in behalf of appellant Kneeland, filed in this cause at the last term of this Court; and that the decree appealed from be reversed.

Respectfully submitted,

JOHN M. BUTLER,

Of Counsel for Appellant.

Indianapolis, Ind., September 28, 1891.

Office Supreme Court U. S.
FILED,
APR 20 1891
JAMES H. McKENNEY
CLERK

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1890.

NO. 335.

Sylvester H. Kneeland,

Appellant,

vs.

Luce & Newton,

Appellees.

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEES.

CHARLES PRATT,
Of Counsel for Appellees.

BARKDULL PRINTING HOUSE, TOLEDO, OHIO.

SUPREME COURT OF UNITED STATES,

OCTOBER TERM, 1890.

NO. 335.

SYLVESTER H. KNEELAND, *Appellant*,

vs.

LUCE & NEWTON, *Appellees*.

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEES.

STATEMENT.

The appeal here is taken by Mr. Kneeland from so much of a decree entered in the Indiana Circuit Court on the 16th day of April, 1887, as provided for the payment to Newton and Luce of the sum of $8028.96.

This was one of the items in a general decree made upon a joint hearing before the judges of the sixth and seventh judicial circuits, for the purpose of passing upon reports by Special Masters A. J. Ricks and William P. Fishback, allowing claims against the several divisions of the Toledo, Cincinnati & St. Louis Railroad Company, as being prior to the mortgage indebtedness.

This decree recites, (page 56 of printed transcript):

> "This cause coming on to be further heard before Hon. Walter Q. Gresham, judge of the seventh judicial circuit, Hon. Howell E. Jackson, judge of the sixth judicial circuit, and Hon. Martin Welker, district judge of the northern district of Ohio, sitting together, upon the various masters' reports and evidence and the exhibits filed therewith and the several exceptions filed thereto, and upon questions reserved by the joint decree rendered October 1st, 1886, and upon the application of the receiver, William J. Craig, for additional compensation and evidence heard by the court upon said application.
>
> "The several parties in interest having been duly notified of said joint hearing, and being present in person or by counsel, upon full argument the court, the said judges concurring, doth here now finally order, adjudge and decree as follows, touching the several matters hereinafter in this decree mentioned and set forth, to-wit:"

The third clause of this decree orders as follows (page 57):

> "3. All of the claims set forth in Exhibit "A," with report of Fishback and Ricks, special masters, filed March 10th, 1887, excepting only," etc., * * * * * * * * * "and the purchasers of said several divisions are hereby ordered, directed and decreed, within thirty (30) days from and after the entry of this decree, to pay into the registry of the Circuit Court of the United States for the district of Indiana, a sum of money sufficient to pay and discharge the proportional part of said entire indebtedness as set forth in Exhibit "A,"

and payable as provided in clause one of this decree, excepting the claims hereinabove excepted and disallowed, payable and charged against said several divisions upon the basis of percentage as herein decreed and set forth, subject to the credits as provided in the tenth clause of this decree.

"The names of the claimants and the amount allowed to each claimant respectively is set forth in said Exhibit "A," and is herein and hereby allowed and decreed to be paid, being the following, namely:"

Then follows a list of the claims so ordered to be paid, among which (page 59, third from the bottom) is the one here in question.

By the fourteenth clause of the decree (page 64) this amount so ordered to be paid was made chargeable upon, and it was provided that it should be paid out of the proceeds of the Toledo division.

To this order of the court the following exception (page 61) was entered:

"To which order and decree, decreeing the payment into court of a sum of money sufficient to pay the portion of said claims distributed to the lines purchased by him, purchaser Kneeland excepts for himself and other first-mortgage bondholders, his associates, and said Kneeland and his associates especially and specifically except to the ruling of the court requiring payment of the claims of Luce & Newton and Stebbins, as set forth in said Exhibit "A," filed March 10th, 1887, with the report of Masters Ricks and Fishback."

And at the close of the decree (page 64) the following appeal was entered:

> "Comes now Sylvester H. Kneeland, purchaser of the Toledo, Cincinnati and St. Louis Railroad, extending from Toledo, Ohio, to East St. Louis, Illinois, as such purchaser and representative of certain bondholders holding bonds secured upon said railroad so purchased by him as aforesaid, and prays the court for an appeal to the Supreme Court of the United States from so much of the decree entered herein on April 16th, 1887, as requires said purchaser to pay the claim of Charles L. Luce and John T. Newton, amounting to $8,028.96, upon said purchasers giving supersedeas bond upon said appeal.
>
> "And the court now grants said appeal upon the giving, by said Sylvester H. Kneeland, purchaser as aforesaid, of a supersedeas bond, with surety, to be approved by the court, in the amount of $12,000."

The Toledo division extended from Toledo, in Lucas County, Ohio, to Kokomo, in the State of Indiana, lying partly in the western division of the northern district of Ohio, and partly in the district of Indiana.

The mortgage under foreclosure as to this division was made to the Central Trust Company of New York, and Bills in Chancery had been filed by it in the Circuit Court in the district of Indiana, No. 7706 in that court, on the 20th of October, 1883, and concurrently in the western division of the northern district of Ohio, being No. 382 in that court (page 1 of record).

The decree in the Indiana court was made on the 12th of November, 1885, (page 25,) and was ordered (page 34) to be certified to the Circuit Court of the Northern District of Ohio, Western Division.

The record as here printed does not show the date of the entry of the decree in the Ohio Court, but the special masters making the sale report on the 30th of December, 1885, (page 35.)

> "The undersigned, Wm. P. Fishback and John McNulta, the special masters appointed herein, and charged with the duty of making the sale herein, according to the direction of the several orders and decrees made in the above entitled cause in the Circuit Court of the United States for the District of Indiana and the Northern District of Ohio, Western Division, respectfully report to the court as follows:
>
> "Pursuant to said orders and decrees, notice of the time, place, and terms of sale was given by publication of said notice as follows:"

And after naming the papers, in which publications were made, the report continues, (bottom of page 35, and top of page 36:)

> "After having given said notice in the manner aforesaid and pursuant thereto, and in obedience to the several decrees and orders of said courts in that behalf, the undersigned special masters attended in person at the said city of Indianapolis, County of Marion, State of Indiana, and at the door of the United States Circuit Court room for the District of Indiana, upon the day appointed and at the hour named in said notice of sale, and, in the presence

> of a number of persons attending said sale, and having the opportunity to bid thereat, did then and there at public outcry openly offer and expose to sale, upon the terms and provisions of said decrees and orders of said courts and said notice of sale, as an entirety all and singular the entire railroad of the Toledo, Delphos and Burlington Railroad Company, and the Toledo, Cincinnati & St. Louis Railroad Company, extending from the city of Kokomo, in the State of Indiana, to the city of Toledo, in the State of Ohio, with all its franchises, rights and privileges as described in the printed paper which was read by the special master at the time and in the hearing of the persons so assembled, to-wit:"

Report of the masters then gives in full the advertisement which had been made by them for the sale of the property, setting forth (page 36) that it was made under the decree of the Circuit Court of the District of Indiana,

> "and a like decree rendered by the Circuit Court of the United States for the Northern District of Ohio, Western Division, in an ancillary cause wherein the same complainants were complainants and the same defendants were defendants, in each of which a decree of foreclosure has been entered in said courts upon certain mortgages and trust deeds executed by the Toledo, Delphos & Burlington Railroad Company to the Central Trust Company of New York, on the 17th day of January, 1880, the undersigned, special masters appointed by the said courts, will offer for sale, at public auction, to the highest bidder, at the door of the United States Circuit Court room, in the city of Indianapolis, in the County of Marion and State of

Indiana, on Wednesday, the 30th day of December, A. D. 1885, at 12 o'clock noon of said day, all the following described property, namely:"

Then follows the description of the line of road between Toledo and Kokomo, and Sylvester H. Kneeland is reported as having bid for the same the sum of $600,000.

This sale was confirmed February 5th, 1886, and March 10th, 1886, the deed as made by the masters to Mr. Kneeland was presented and approved by the court, (page 40 and 41,) and a copy of the order of approval was directed to be sent to the Ohio Court.

This deed recited among other things the entry of the concurrent decrees of foreclosure in the Indiana Court and in the Northern District of Ohio, and the appointment by ancillary and concurrent decrees of that court of said masters to make the sale in accordance with the terms of the decree entered in the Indiana Court.

It further recites the filing of the report by the special masters of the sale of the Toledo division in the Ohio Court, and the confirming of the report of the masters by the Ohio Court, (pages 45, 46 and 47.)

The appellant, Kneeland, takes whatever title he has, or can claim to have to any part of the property under these decrees, and this sale and deed.

On the 12th day of December, 1885, a decree was rendered in the Western Division of the Northern District of Ohio in the ancillary case No. 382 of that court, in favor of Luce and Newton, and Martha and George

Stebbins, and a certified copy of this decree was, on the 8th of January, 1886, filed in the case, in the Indiana Court, (pages 49-51.)

This decree found that there was due to Luce and Newton, for right-of-way of certain property in the city of Toledo, purchased by the Railroad Company, the sum of $8,028.96, with interest to be computed from that date. It also found an amount due to Stebbins for like right-of way purchased from them, and by the fourth clause of the decree the court found as follows:

> "And the court further finds that said above described premises and right of way are part of the property of the Toledo, Cincinnati & St. Louis Railroad Company, covered by the mortgage of the Toledo, Delphos and Burlington Railroad Company, set forth in and for the purpose of foreclosing which the complainants bill herein was filed, and which mortgage is a lien upon said premises and right of way, *subject and second* to the respective liens of said defendants, Newton and Luce and Martha Stebbins and George Stebbins, as above found, and that in equity and for the protection of the rights of all the parties, all the property covered by said mortgage will be sold *as an entirety*."

Upon these findings the court decreed:

> "Wherefore it is considered and ordered by the court that the said John T. Newton and Charles L. Luce have and recover said sum of $8,028.96 so due to them, and said Martha Stebbins and George Stebbins have and recover said sum of $3,969.87 so due to them as liens upon all the proceeds of any sale of said mortgaged property that shall be made herein *prior to the claims of said mortgage or any*

bond or other claims secured thereby; and it is ordered that so much of said proceeds as may be necessary to pay said sums so above found due to said Newton and Luce and said Martha and George Stebbins and each of them, with the accruing interest and all costs of said defendants, shall be applied to such payment before paying any part of said mortgage debt, and said premises shall be in any order of court making distribution of the funds arising from any sale of said mortgaged property under foreclosure proceedings herein."

The amount decreed in favor of Stebbins having been paid, that found in favor of Luce and Newton is the one in question. This decree went with other claims against the road, into the hands of Special Master Ricks, and on the 30th day of July, 1886, he filed what was designated his fifth interlocutory report, attaching as Exhibit "A" a statement of these amounts in favor of Luce and Newton and Stebbins, reporting that the same are correct, and that:

> "The claims of Newton and Luce for right of way are covered by decree of the Circuit Court of the United States for the Northern District of Ohio for the amounts approved in 'Exhibit A,'" (pages 52 and 53.)

On the 31st of August, 1886, Special Master Fishback reports to the court as to numerous claims covered by several of Mr. Ricks' reports, and as to these as follows: (page 53:)

> "Newton & Luce and Stebbins and others.
>
> "These claims are for right of way, based upon the decree made at Toledo. I report that the two amounts, $8,028.96, to Newton & Luce, and

$3,969.87, to Martha and Geogre Stebbins, should be paid by the Toledo Division."

On the 21st of September, 1886, Mr. Kneeland filed general exceptions to the report of Mr. Fishback, and to several reports of Mr. Ricks, (pages 54 to 56.)

The *first* exception is not as to the amount of any claim in the report, but generally as to the division of these claims among the different divisions of the road.

The *second* exception is in reference to claims for losses, over charges, and fencing, claims for supplies, labor and materials accruing during the receivership and the apportionment and distribution of the same among the different divisions of the road.

The *third* exception is in reference to the apportionment of these claims among the different divisions, and specially as between the Ohio divisions, and those between Toledo and St. Louis.

The *fourth* and last exception is to the effect that the master has allowed as obliviously correct claims for labor, supplies and material furnished during the period while the entire system was operated by the receivers; whereas they should have charged only a proportional part of the same against the portions sold. The exceptions close with a prayer that the masters be required to make the proper apportionment and distribution of the claims to the several parts of the system, in accordance with the apportionment adopted by the court in reference to car rentals.

There is nothing whatever in the exceptions questioning the report of the masters in reference to the Luce and Newton claim; its amount, or as to its payment

wholly out of the Toledo division. The claim is not mentioned in either of the exceptions, neither is there a question raised as to any right-of-way claim. *No other exceptions were ever filed.*

The sixteenth (16) clause in the decree of foreclosure and sale of property (page 34) reserving the right to appeal from orders of decrees of the court to this court, is as follows:

> "16th. The complainants herein and the purchaser or purchasers, at the foreclosure sale under this decree, reserve the right to appeal from any orders and final decrees made by the court directing and decreeing the payment of claims and debts found and determined and adjudged and decreed to be due and payable as *court and receiver's indebtedness*, and to be prior and superior in equity to the lien of said first deed of trust and mortgage herein and hereby foreclosed, if they shall be so advised."

By the twelfth clause of the decree (page 31 and 32), provision was made for the payment within a limited time of the claims and debts that should at the time of the sale have been decreed to be liens upon the property prior to the mortgage, and as had not then been superseded by proper appeal and supersedeas bond.

The decree in favor of Luce and Newton had been rendered before the sale had been made by the masters to Mr. Kneeland.

ARGUMENT.

FIRST.

Mr. Kneeland neither as purchaser under the foreclosure decree, nor in any other capacity had any standing

in court which gave him the right to appeal from the decree of April 16th, 1887, in so far as said decree ordered the payment to Luce and Newton of the claim for right of way, decreed in their favor on the 12th of December, 1885.

1. No appeal was ever taken from the decree of December 12th, 1885. The complainants might have appealed from that decree at any time during the limit of appeal. Mr. Kneeland was not one of the complainants, but neither he nor they ever *attempted* to appeal from that decree. The decree has never been attacked in any form.

The amount of Luce and Newton's claim, its character and priority were fixed and adjudicated facts at the time Mr. Kneeland became the purchaser under the decree.

Under his bid he was required by the terms of the foreclosure decree to pay into the court, within the time limited, by the twelfth clause of that decree, sufficient money to pay this and other debts. So far as he was concerned as purchaser, he was as surely required to do this as was the purchaser in case of *Stewart vs. Gay, 127 U. S., page 518.*

2. The foreclosure decree in this case did not reserve either to the complainants or to Mr. Kneeland, as purchaser, the right to appeal from the decree of April 16th, 1887, *as to the claim of Luce and Newton, or any other claim for right of way.*

The right of appeal reserved was as to such claims as might be adjudged to be due "*as court and receiver's indebtedness.*"

There is no reservation to any right of appeal in favor

of any body from any adjudication then made, or that had theretofore been made, or that might be thereafter made, for the payment of *right-of-way*, any more than there was a right reserved to appeal from such an order in reference to the payment of taxes.

This case is wholly outside of the car rental cases in the 136 United States, and is within *Blossom vs. Milwaukee Railroad Company, 1st Wallace, page 655, and Swan vs. Wrights, Executor, 110 U. S., page 591.*

The first of these decisions is directly in point as to any right he might have claimed to have appealed from, that of December 12th, 1885, and as to the right of appeal from that of April 16th, 1887, there is nothing whatever in this reservation giving the purchaser, at the sale under the decree here, any larger right to contest a right of way claim like this than the purchaser had in the case in the 110 U. S.

In the opinion of the court by Mr. Chief Justice Fuller, in *Trust Company vs. Grant Locomotive Works, 135 U. S., 207*, is a full discussion of the question of the right of the purchaser to appeal from such a decree, and the decision there is based upon the position that there was in that decree of foreclosure no right reserved to the purchaser to appeal from the decree of the court upon the claim then in question, and in the case of *Kneeland vs. American Loan Company, 136 U. S. page 89*, Mr. Justice Brewer in the opinion of the court deduces from the cases, and establishes this as a rule, (page 95):

> "First. A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the pefecting of his

purchase ; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, *or are expressly reserved to him by such decree.*"

In this case there certainly is no *express reservation* of the right to appeal as to this claim, and it can hardly be claimed that any such right could be inferred upon anything in the decree, even if it were proper to resort to inference to sustain such right.

SECOND.

There is not upon this record, or in fact, any ground whatever for contesting or even questioning the justice or equity of this claim, as established by the decree of December 12th, 1885, and ordered to be paid by that of April 16th, 1887.

1. The decree of April 12th, 1885, has never been questioned as to its correctness in the amount found due, or as to its character, or priority as a right of way claim.

No evidence *against it* has ever been given, or sought to be given by any one upon any point.

2. This right of way is a part of the property purchased by Mr. Kneeland under the sale of the property as a whole, such sale as an entirety being necessary in order to protect the bond holders, and he is now holding it as a part of the entire property under the sale made by virtue of the decree and confirmed by the court and deed made and approved.

3. A certified copy of the decree of December 12th, 1885, as made in the Ohio court, in which the ancillary proceedings were had, and decrees rendered, and within

the jurisdiction of which this part of the railroad property was situated, was filed in the Indiana court where the principal proceedings were carried on, and into whose registry the proceeds of the sale were paid; and such certified copy has been before the two special masters, each and both of whom have approved and reported it as a right of way claim, unquestioned in amount, entitled to priority over the mortgage, and payable out of the proceeds of the sale of the Toledo Division.

4. To these reports in so far as they relate to *this claim, no exception whatever has ever been filed by Mr. Kneeland, or the complainants in the case, or by any other person.*

5. The only attempt that has ever been made to take any exception to the allowance or payment of this claim is the one embodied in the decree of April 16th, 1887. In this Mr. Kneeland, as purchaser, excepts for himself and other first-mortgage bondholders to the ruling of the court requiring payment of this claim, *but no ground of exception whatever is stated, nor is any evidence whatever introduced or sought to be introduced to sustain or furnish a basis for exception.*

In short there is nothing now in this record to cast even a suspicion upon the correctness of any finding, report or decree made in reference to this claim.

FINALLY.

There being nothing whatever to warrant this appeal, Mr. Kneeland has been withholding so much of his purchase money as was required to pay this decree *without justification.*

It should have been paid by the terms of the fore-

closure, within twenty (20) days after his purchase. But although the Circuit Court, by its decree of April 16th, 1887, decreed that he might pay it in within thirty (30) days from that date, without interest, yet he chose to tie it up for four (4) years longer by this appeal, not even printing the record until the last moment. Counsel received the printed transcript, April 13th, 1891. It would seem that the time has at last come when he should be required to pay the money into court with costs and interest, and that *penalty* ought also to be adjudicated against him, if under the rules the court can award penalty.

Respectfully submitted,

CHARLES PRATT,
Of Counsel for Appellees.

April 17th, 1891.

Office Supreme Court U. S.
FILED
APR 27 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1890.

NO. 335.

Sylvester H. Kneeland,

Appellant,

vs.

Luce & Newton,

Appellees.

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR THE DISTRICT OF INDIANA.

SUPPLEMENTAL BRIEF FOR APPELLEES.

CHARLES PRATT,
Of Counsel for Appellees.

BARKDULL PRINTING HOUSE, TOLEDO, OHIO.

Supreme Court of United States.

NO. 335.

SYLVESTER H. KNEELAND, *Appellant*,

vs.

LUCE & NEWTON, *Appellees*.

SUPPLEMENTARY BRIEF FOR APPELLEES.

The brief filed in behalf of the appellees in this case was prepared at once upon receipt of a printed transcript of the record, and since that time Mr. John M. Butler has filed brief on behalf of appellants. By way of reply, and in addition to brief already filed, this statement and the points herein are made.

FIRST.

AS TO STATEMENT OF FACTS.

Mr. Butler fell into error in his statement that the litigation which resulted in the decree in favor of Luce & Newton (page 49 of record) was the result of litigation in the Indiana court.

That decree is directly shown to have been in the Ohio court, and if it were to be reviewed in this court the record of the Ohio court should have been brought

here. This record would have shown that the property here in question was not any part of that involved in case No. 137 of this term of this court.

The reference to the Luce, Newton & Stebbins contract, on pages 459 and 460 of the latter case, is merely incidental, growing out of the fact that there were two terminals of this railroad at Toledo, and all questions relating to both were on hearing at the same time, before Mr. Ricks, as master.

The case No. 137 contains only the exhibits relating to the terminal there in question, and for that reason does not contain the Luce & Newton Exhibits, Nos. 35 and 36. This appears from pages 248 and 249 of the record in case No. 137, by looking at which it will be seen that the exhibits are omitted from Nos. 21 to 47.

The Hamilton case, No. 184 of the October term of 1889, contains that portion of the Ohio record relating to Mr. Hamilton's claim. It does not, however, contain the Luce & Newton decree; neither the pleadings or testimony upon which that decree was based.

That decree was taken on a different day of the same term as the Luce & Newton decree, but the appeal to this court was entered in the Hamilton decree, and no appeal was taken from the Luce & Newton decree.

The part of the report of Master Ricks upon the reference of the Ohio court relating to Hamilton's claim is also copied in that record, while that part of the same report referring to the Luce & Newton claim is not copied in the Hamilton record.

If the complainants in that case had desired to review in this court the Luce & Newton decree, it could only have been done by appealing from that decree and

bringing up so much of the record of the Ohio court as would have shown the pleadings and other proceedings in that court upon which that decree was founded.

This record, if it had been brought, would have contained the bill of complaint on pages 1 to 10 of the record in the Hamilton case, the amendment to the original bill, pages 31 to 45, reference to Mr. Ricks, pages 45 and 46, and in addition to that, the answer of Luce & Newton, the exhibits and testimony before Mr. Ricks in reference to that claim, and the part of Mr. Ricks' report relating to the Luce & Newton claim.

SECOND.

It hardly seems within the proper province of argument in this case to enter upon a discussion of the questions which might have been made if the complainants in case No. 382 had seen fit to appeal from the Luce Newton decree, and bring up to this court the necessary record. But Mr. Butler having made some points in reference to the correctness of that decree, I will notice very briefly some of the points made by him:

1. His argument as to parol license and entry has no bearing upon the question. There was a contract between the company and the landowners in reference to this right-of-way. This contract was one which the company was competent to make, and before they could proceed to condemnation they were required to attempt to agree with the landowners. They did agree with them. Contract obligations therefore existed between the company and the landowners. These obligations were binding upon both, requiring the landowers to convey upon the performance of the conditions specified in the contract, and the company to pay the purchase price.

here. This record would have shown that the property here in question was not any part of that involved in case No. 137 of this term of this court.

The reference to the Luce, Newton & Stebbins contract, on pages 459 and 460 of the latter case, is merely incidental, growing out of the fact that there were two terminals of this railroad at Toledo, and all questions relating to both were on hearing at the same time, before Mr. Ricks, as master.

The case No. 137 contains only the exhibits relating to the terminal there in question, and for that reason does not contain the Luce & Newton Exhibits, Nos. 35 and 36. This appears from pages 248 and 249 of the record in case No. 137, by looking at which it will be seen that the exhibits are omitted from Nos. 21 to 47.

The Hamilton case, No. 184 of the October term of 1889, contains that portion of the Ohio record relating to Mr. Hamilton's claim. It does not, however, contain the Luce & Newton decree; neither the pleadings or testimony upon which that decree was based.

That decree was taken on a different day of the same term as the Luce & Newton decree, but the appeal to this court was entered in the Hamilton decree, and no appeal was taken from the Luce & Newton decree.

The part of the report of Master Ricks upon the reference of the Ohio court relating to Hamilton's claim is also copied in that record, while that part of the same report referring to the Luce & Newton claim is not copied in the Hamilton record.

If the complainants in that case had desired to review in this court the Luce & Newton decree, it could only have been done by appealing from that decree and

bringing up so much of the record of the Ohio court as would have shown the pleadings and other proceedings in that court upon which that decree was founded.

This record, if it had been brought, would have contained the bill of complaint on pages 1 to 10 of the record in the Hamilton case, the amendment to the original bill, pages 31 to 45, reference to Mr. Ricks, pages 45 and 46, and in addition to that, the answer of Luce & Newton, the exhibits and testimony before Mr. Ricks in reference to that claim, and the part of Mr. Ricks' report relating to the Luce & Newton claim.

SECOND.

It hardly seems within the proper province of argugument in this case to enter upon a discussion of the questions which might have been made if the complainants in case No. 382 had seen fit to appeal from the Luce Newton decree, and bring up to this court the necessary record. But Mr. Butler having made some points in reference to the correctness of that decree, I will notice very briefly some of the points made by him:

1. His argument as to parol license and entry has no bearing upon the question. There was a contract between the company and the landowners in reference to this right-of-way. This contract was one which the company was competent to make, and before they could proceed to condemnation they were required to attempt to agree with the landowners. They did agree with them. Contract obligations therefore existed between the company and the landowners. These obligations were binding upon both, requiring the landowers to convey upon the performance of the conditions specified in the contract, and the company to pay the purchase price.

2. This contract having been made after the mortgage, the bondholders might repudiate or ratify it. If they ratify, they must ratify as a whole, and take the interest of the company under the after acquired property clause. There is no necessity in this court for argument as to the effect of such a ratification and such a taking.

The decisions referred to by the gentlemen in the 12 Wallace, 99 United States, and in other cases so well known as not to need citation, state the position so that it can not be questioned; and this court in the opinion of this court as delivered in case No. 137, at this term, by Mr. Justice Brewer, fully recognizes the rule.

3. The bondholders did see fit to ratify the contract. It is true, as stated by Mr. Butler on page three of his brief, that the Ohio Record, if it were fully here, would show that the complainants, the trustee and the bondholders, offered in evidence the Luce, Newton and Stebbins contract in support of their right to hold this property under their mortgage.

Under the decree obtained in that case, as shown in brief before filed, Mr. Kneeland purchased and now holds this right-of-way. He is thus placed squarely in the position of the company, and can claim no better right as against Luce and Newton than the company could have claimed. *99 U. S. 235; 12 Wall 364, etc.*

In the case cited by Mr. Butler on page 15 of his brief, Judge Drummond, in the quotation made, says that the mortgagee may accept the action of the railroad company, *and so allow the claim to be paid, etc.*

4. The decree having been taken by the complainants for the sale of this Toledo Division as a whole, and

sale of it having been so made, there is no way to provide for the payment of the consideration to the landowner, other than that fixed by the decree in favor of Luce and Newton, and provided for in the subsequent orders of the court.

In so far as the decision or practice of the state courts in Ohio could fix a rule or precedent for the making and payment of such a decree, there is direct authority in the decision of the Ohio Supreme Court.

D. X. & B. R. R. Company vs. Lewton, 20 Ohio State Report, pages 401, 412 and 413.

It is also recognized in the case in this court of the *Central Trust Company vs. Seasongood, 130 U. S. 482.*

The decree in that case in the Ohio Court was in the same form as the decree in favor of Luce and Newton here.

Respectfully submitted,

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Counsel for Appellees.

April 23d, 1891.